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ferently. As the opinion explains, the data offered in this case was not sufficiently reliable to support such an inference. *See* majority op. at 69–71. In particular, plaintiff's attempt to control for "special degrees" in her regression analysis failed because of the haphazard method by which such data were collected. *See* majority op. at 70 n.21. *See also* Tr. V, p. 47 (Testimony of Dr. Gastwirth). It does not follow, however, as the petitions for rehearing suggest, that plaintiffs will be required to provide job-specific data for every job requiring special qualifications. Thus I assume that in appropriate cases, plaintiffs may be able to make out a prima facie case of disparate treatment by employing reliable data that aggregate across jobs requiring specialized training. In each case, the critical question is whether there is a reasonable basis for inferring disparate treatment.

WEST KEY NUMBER SYSTEM

Frank Derek GREENTREE, Appellant,

v.

U. S. CUSTOMS SERVICE, et al.

Frank Derek GREENTREE, Appellant,

v.

DRUG ENFORCEMENT ADMINISTRATION, et al.

Nos. 81-1829, 81-1830.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 22, 1982.

Decided March 26, 1982.

Action was brought alleging that United States Customs Service's withholding of certain investigatory information pertaining to plaintiff was violation of Freedom of Information Act. On parties' cross motions for summary judgment, the United States District Court for the District of Columbia, John Lewis Smith, Jr., J., 515 F.Supp. 1145 granted defendant's motion for summary judgment, and plaintiff appealed. The Court of Appeals, Wald, Circuit Judge, held that material unavailable under the Privacy Act was not per se unavailable under the Freedom of Information Act.

Reversed and remanded.

1. Records ⇐50

While the Privacy Act was designed to provide individual with more control over gathering, dissemination, and accuracy of agency information about themselves, the Freedom of Information Act was intended to increase public's access to governmental information. 5 U.S.C.A. § 552a(a)(4, 5), (b)(1, 9).

2. Records ⇐31, 55

Material unavailable under the Privacy Act is not per se unavailable under the Freedom of Information Act; applicable section of Privacy Act represents congressional mandate that Privacy Act not be used as a barrier to FOIA access. 5 U.S.C.A. §§ 552(b)(3), 552a(b)(3), 552a(b)(2), (q).

Appeals from the United States District Court for the District of Columbia (D.C. Civil Action Nos. 80–01869 and 80–1007).

Cornish F. Hitchcock, Washington, D. C., with whom Richard Manning Ricks, Washington, D. C., was on the brief, for appellant.

Douglas Letter, Atty., Dept. of Justice, Washington, D. C., with whom Charles F. C. Ruff, U. S. Atty., Washington, D. C., at the time the briefs were filed, and Leonard Schaitman, Atty., Dept. of Justice, Washington, D. C., were on the brief, for appellees. Kenneth M. Raisler and John C. Martin, Asst. U. S. Attys., Washington, D. C., also entered appearances, for appellees.

David C. Vladeck and Katherine A. Meyer, Washington, D. C., were on the brief, for amicus curiae, Freedom of Information Clearinghouse urging reversal.

Before BAZELON, Senior Circuit Judge, and WALD and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

This is a case of first impression in this circuit. It questions whether the Privacy

Act, 5 U.S.C. § 552a, is an exempting statute within the meaning of subsection (b)(3) ("Exemption 3") of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(3), which bars access under FOIA to information "specifically exempted from disclosure by [any other] statute."[1] Although the government (assuming a position based upon a longstanding policy), as well as appellant Greentree, urged otherwise, *see* Joint Appendix (J.A.) at 29, 39, the district court held that criminal law enforcement information exempt from disclosure under section (j)(2) of the Privacy Act, *see* n.15 *infra*, is automatically exempt under Exemption 3 of FOIA. *Greentree v. United States Customs Service*, 515 F.Supp. 1145 (D.D.C.1981); J.A. 41. The government has now reversed its position and here supports the decision of the district court. Even so, we cannot accept the district court's interpretation. Our reading of the relevant statutes and their legislative history convinces us that material unavailable under the Privacy Act is not *per se* unavailable under FOIA. Therefore, we *reverse* the decision of the district court and *remand* so that the district court may consider appellant's FOIA request independently of the Privacy Act.[2]

I. BACKGROUND

After being indicted and convicted in federal district court in Louisiana for attempting to import several tons of marijuana into the United States, appellant Greentree brought suit to enjoin state prosecution based upon the same events. Greentree sought to gather information relevant to his civil action by filing FOIA and Privacy Act requests with the Drug Enforcement Administration ("DEA") and the United States Customs Service ("Customs"). Relying upon specific exemptions both in FOIA (not including Exemption 3) and in the Privacy Act, DEA and Customs refused to release certain material. Pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552a(g)(1), Greentree sued in federal district court. Both agencies then moved for summary judgment. In the case against Customs, the district court, on its own initiative, requested briefs on the question of whether records protected from disclosure to the subject of the records (first party requester) under the Privacy Act are automatically exempt from disclosure to the same individual under FOIA Exemption 3. J.A. 28.

Both Greentree, J.A. 39, and the government, J.A. 29, argued to the district court that the Privacy Act was not an Exemption 3 statute. Nevertheless, the district court granted summary judgment to both DEA and Customs on the ground that the Privacy Act does qualify as a withholding statute.[3] In reaching this conclusion, the district court relied upon the statutory language and legislative history of the Privacy

1. Exemption 3 provides in full that access under FOIA is barred if the material sought is

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3).

2. It may be, *e.g.*, that appellant has, in any event, requested material unavailable under FOIA, as well as the Privacy Act. *See, e.g.*, Exemption 7, 5 U.S.C. § 552(b)(7), which exempts

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . .

3. The district court therefore found it unnecessary to consider whether the material sought was exempt under the other specific exemptions of FOIA raised by the government. *See* Affidavits of Salvatore E. Caramagno and James P. Collier, J.A. 22, 68.

Act. Further, the district court's analysis was supported by decisions from the fifth [4] and seventh [5] circuits, and by *dictum* in an earlier opinion of this court.[6] Nevertheless, we cannot uphold the decision. The question presented is a difficult one,[7] but we believe that Congress did not intend the Privacy Act to bar disclosure under FOIA Exemption 3.

II. ANALYSIS

A. *The Statutory Scheme*

[1] Both FOIA and the Privacy Act evidence Congressional concern with open government, and especially, accessibility of government records. Each seeks in different ways to respond to the potential excesses of government. Each, therefore, has its own functions and limitations. 1 K. Davis, Administrative Law Treatise § 5:2 (2d ed. 1978 & Supp. 1980); R. Bouchard & J. Franklin, Guidebook to the Freedom of Information and Privacy Acts 21–22 (1980). While the Privacy Act was designed to provide *individuals* with more control over the gathering, dissemination, and accuracy of agency information about themselves, FOIA was intended to increase the *public's* access to governmental information. *Id.* The Privacy Act limits access to any "record" [8] contained in a "system of records" [9] without the consent of the individual to whom the record pertains *unless* disclosure is requested by Congress,[10] a court,[11] an authorized agency,[12] or certain specifically qualified

4. *Painter v. Federal Bureau of Investigation*, 615 F.2d 689 (5th Cir. 1980).

5. *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980).

6. *Duffin v. Carlson*, 636 F.2d 709, 711 (D.C.Cir. 1980).

7. Aware that our decision creates a split among the circuits, *see* pp. 86 89 *infra*, we approach our task with special care.

8. The term "record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph . . . ." 5 U.S.C. § 552a(a)(4).

9. A "system of records" means "a record in a system of records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual . . . ." 5 U.S.C. § 552a(a)(5).

10. 5 U.S.C. § 552a(b)(9) (restriction on disclosure inapplicable to "either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee").

11. 5 U.S.C. § 552a(b)(1) (disclosure allowed when ordered by a court of competent jurisdiction).

12. 5 U.S.C. § 552a(b)(1), (3), (4), (6), (7), (10), permits disclosure, without first party consent,

> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
>
> . . . .
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
>
> (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
>
> . . . .
>
> (6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;
>
> (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;
>
> . . . .
>
> (10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office . . . .

persons,[13] or is required by FOIA.[14] Moreover, even first party access is limited under the Privacy Act for reasons of, *inter alia*, national security and law enforcement.[15] Similarly, public access to information under FOIA is also limited; excluded

13. *See* 5 U.S.C. § 552a(b)(5) and (8), which exempt from the Privacy Act's access limitations disclosure

> (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable; [and]
>
> ....
>
> (8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual ....

14. 5 U.S.C. § 552a(b)(2) (expressly insuring public access to any material available under FOIA). *Cf.* 5 U.S.C. § 552a(g) ("No agency shall rely on any exemption contained in section 552 of this title [FOIA] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.").

15. 5 U.S.C. § 552a(j) and (k):

> (j) General exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
>
> (1) maintained by the Central Intelligence Agency; or
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.
>
> At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.
>
> (k) Specific exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—
>
> (1) subject to the provisions of section 552(b)(1) of this title;
>
> (2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;
>
> (3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;
>
> (4) required by statute to be maintained and used solely as statistical records;
>
> (5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;
>
> (6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or
>
> (7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the

Act. Further, the district court's analysis was supported by decisions from the fifth [4] and seventh [5] circuits, and by *dictum* in an earlier opinion of this court.[6] Nevertheless, we cannot uphold the decision. The question presented is a difficult one,[7] but we believe that Congress did not intend the Privacy Act to bar disclosure under FOIA Exemption 3.

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7. Aware that our decision creates a split among the circuits, see pp. 86 89 *infra*, we approach our task with special care.

8. The term "record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph . . . ." 5 U.S.C. § 552a(a)(4).

9. A "system of records" means "a record in a system of records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual . . . ." 5 U.S.C. § 552a(a)(5).

10. 5 U.S.C. § 552a(b)(9) (restriction on disclosure inapplicable to "either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee").

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12. 5 U.S.C. § 552a(b)(1), (3), (4), (6), (7), (10), permits disclosure, without first party consent,

> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
>
> . . . .
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
>
> (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;
>
> . . . .
>
> (6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;
>
> (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;
>
> . . . .
>
> (10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office . . . .

persons,[13] or is required by FOIA.[14] Moreover, even first party access is limited under the Privacy Act for reasons of, *inter alia*, national security and law enforcement.[15] Similarly, public access to information under FOIA is also limited; excluded

13. *See* 5 U.S.C. § 552a(b)(5) and (8), which exempt from the Privacy Act's access limitations disclosure

> (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable; [and]
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> . . . .
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> (8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual . . . .

14. 5 U.S.C. § 552a(b)(2) (expressly insuring public access to any material available under FOIA). *Cf.* 5 U.S.C. § 552a(g) ("No agency shall rely on any exemption contained in section 552 of this title [FOIA] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.").

15. 5 U.S.C. § 552a(j) and (k):

> (j) General exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
>
> (1) maintained by the Central Intelligence Agency; or
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.
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> At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.
>
> (k) Specific exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—
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> (1) subject to the provisions of section 552(b)(1) of this title;
>
> (2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;
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> (3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;
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> (4) required by statute to be maintained and used solely as statistical records;
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> (5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;
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> (6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or
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> (7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the

from FOIA's disclosure requirements are national security and internal agency matters, matters "specifically exempt" by other statutes, confidential business information, deliberative internal communications within the executive branch, information about individuals disclosure of which would constitute a "clearly unwarranted invasion of personal privacy," certain investigatory records compiled for law enforcement purposes, records relating to the examination of financial institutions and records containing oil well information.[16]

It is readily apparent from the foregoing review that the Privacy Act and FOIA substantially overlap. However, it is apparent also that the two statutes are not completely coextensive; each provides or limits access to material not opened or closed by the other. For example, while both restrict access to investigatory material, they do so to a different degree and under different conditions. *Compare* 5 U.S.C. § 552(b)(7) *with* 5 U.S.C. §§ 552a(j)(2) and (k)(2) and (5).

The present case questions the relationship between section (j)(2) of the Privacy Act and Exemption 3 of FOIA. After holding that the material sought was unavailable to Greentree under section (j)(2) of the Privacy Act, the district court began its statutory analysis of this question by examining the language of section (b)(2) of the Privacy Act:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> . . . .
>
> (2) required under section 552 of this title [FOIA]
>
> . . . .

5 U.S.C. § 552a(b)(2). The court summarily rejected the argument that this provision

Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

16. 5 U.S.C. § 552(b) provides that FOIA does not "apply" to matters that are:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

indicated that the Privacy Act was not designed to affect obligations under FOIA, concluding that the notion merely "begs the question ... of whether information exempt under the Privacy Act can, in fact, be required to be disclosed under FOIA." *Greentree*, 515 F.Supp. at 1147. For the district court, that question was resolved by FOIA Exemption 3.

> Since the Privacy Act does refer to particular types of matters to be withheld—all material generated by the exempt systems—the Privacy Act is, by the plain language of FOIA, within the (b)(3) statutory exemption.

Id. at 1147.

Our statutory analysis both begins at a different point and reaches a different conclusion. Under our analysis, there is no need to determine whether section (j)(2) of the Privacy Act meets any of the alternative qualifications of an Exemption 3 statute.[17] Further, we see no need to dwell long upon the *apparent* circularity of section (b)(2) of the Privacy Act in mandating disclosure of only that which is "required" by FOIA (including its Exemption 3).[18] Frankly, we are unimpressed with the discovery that section (b)(2) is somewhat circular. Why was that section inserted into the Privacy Act at all if that act were meant to be a FOIA 3 withholding statute? We must conclude, contrary to the district court, that section (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access.

The government acknowledges that section (b)(2) of the Privacy Act does safeguard FOIA access to the public, but it asks us to deny that access to first party requester. However, we are not at liberty to limit the safeguards of (b)(2), which extend to requests by "any person." Our understanding of the extent of (b)(2)'s coverage is reenforced by the very language of section (j) of the Privacy Act. The authority granted an agency head by that section is, with exceptions not relevant here, specifically limited to exempting "any system of records within the agency from any part of *this* section ...." 5 U.S.C. § 552a(j) (emphasis added). In context, the words "this section" can only refer to section 552a, *i.e.*, the Privacy Act. The specific exceptions to the general exemption, "subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), and (11), and (i)," are subsections of the Privacy Act.[19] This portion of the statute thus appears to be self-contained: the general exemptions, as well as the specific exceptions, limit only other provisions of the Privacy Act itself.

Further, were we to accept the government's argument, a so-called "third party anomaly" would result. That is, a third party might gain access to material under FOIA about an individual unavailable to that individual himself, because of Privacy Act section (j)(2). Such a result would comport with neither logic nor common sense. If such material were allowed into the public domain, how could it be kept from the party whom it concerned? Obviously, any such barrier to first party access could easily be circumvented by the first party's simply locating someone else to act as a third party FOIA requester.

The government acknowledges the anomaly, but suggests that it would arise too rarely to justify concern:

> is circular. In the face of the disclaimer, the government's efforts to mesh the two bills when faced with litigation over the nondisclosure of records to protect privacy may meet considerable difficulty.
>
> Memorandum, *reprinted* in 120 Cong.Rec. 40412 Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579), Source Book on Privacy 875 (1976) (hereinafter Source Book).

17. *See generally*, Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Colum.L.Rev. 1028, 1043–46 (1976).

18. Indeed, the Senate Staff, considering a similar problem of "circularity" between the Privacy Act and Exemption 6 prophetically observed:

> Since the FOI Act itself authorizes the refusal of disclosure where this would constitute an "unwarranted invasion of privacy" the privacy bill's disclaimer of any intent to affect FOI

19. The specific exemption section, 5 U.S.C. § 552a(k), is similarly limited. *See* n.15 *supra*.

> In the vast majority of cases, a third party would be prevented from obtaining access to records about another individual covered by the Privacy Act (particularly if they are law enforcement records) because of the FOIA privacy exemptions (FOIA Exemptions 6 and 7(c)). Under the balancing test used to implement these exemptions, such an invasion of privacy is permitted only where it is outweighed by a countervailing strong public interest in disclosure. *Dept. of Air Force v. Rose*, 425 U.S. 352, 370–76 [96 S.Ct. 1592, 1603–06, 48 L.Ed.2d 11] (1976). Moreover, a "third party anomaly" can only occur where records can and actually have been exempted from access under the Privacy Act, but are nonetheless available through the FOIA. Thus, putting aside its value for academic discussion, the "third party anomaly" is in actuality a minor problem at best.
>
> Government's Brief at 36 n.18.

We find both parts of the government's response unsatisfactory. First, we are not convinced that by balancing "an invasion of privacy" against a "strong public interest in disclosure" under FOIA, third party access will be barred when the third party is hand chosen by a first party who has, in effect, waived all privacy interests. Even the Privacy Act allows third party access to material, normally protected from public access, with the consent of the individual to whom the material pertains. 5 U.S.C. § 552a(b). Second, while we agree that the anomaly would occur only when records were exempt under the Privacy Act but publicly available under FOIA—indeed, as we understand it, that is the definition of the "third party anomaly"—we are not comforted by the reminder. Since the district court did not address itself to whether the material sought here would be publicly available under FOIA, we must assume that we are now confronted with a rare case. The "third party anomaly," therefore, does indeed suggest to us that Congress could not have intended section (j)(2) of the Privacy Act to serve as a withholding statute under FOIA Exemption 3.

The district court and the government, however, have raised a different "anomaly," which they say will result if an individual denied access to his records under section (j)(2) of the Privacy Act is allowed to obtain at least some of that material under FOIA.[20] By allowing first party requesters to pursue alternative access routes, it is suggested that section (j)(2) would be "render[ed] meaningless." *Greentree*, 515 F.Supp. at 1148; Government's Brief at 17. We consider this to be a false anomaly, readily recognized as such by noting that the exemptions of the Privacy Act and FOIA differ in purpose and, therefore, in scope. Although both section (j)(2) of the Privacy Act and Exemption 7 of FOIA limit access to law enforcement records, they do so to a different extent. Unless section (j)(2) is implemented, first party access under the Privacy Act to law enforcement records would be broader than such access under FOIA. Access under FOIA can be restricted if production of records would

> (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case

20. In making its argument, the Government draws upon *dictum* in a recent decision of this court, *per* MacKinnon, J.:

> Congress indicated in its latest enactment, i.e., the Privacy Act, that "it would *not* be appropriate to allow individuals to see their own intelligence or investigative files" containing "sensitive and usually confidential information." . . . From the Privacy Act's prohibition it can be strongly argued that Congress foreclosed disclosure of the same confidential information under the Freedom of Information Act. Why would Congress in one Act categorically prohibit disclosure of information furnished by informants and in another Act compel disclosure of the same confidential information?

Duffin v. Carlson, 636 F.2d 709, 711 (D.C.Cir. 1980). While we cannot accept the government's ultimate argument that anything exempted from first party access under the Privacy Act is also exempted from FOIA access, we do agree that confidential information supplied by informants which is inaccessible under the Privacy Act may be inaccessible under FOIA, 5 U.S.C. § 552(b)(7)(D), as well.

of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. . . .

5 U.S.C. § 552(b)(7). On the other hand, although personal privacy, 5 U.S.C. § 552a(b), and confidential sources, 5 U.S.C. § 552a(k)(2), could be protected under the Privacy Act even if section (j)(2) exempting authority were not exercised, a law enforcement agency might be subject to other onerous and, in some instance, impractical requirements. For instance, sections (e)(1)–(3), (e)(4)(G)–(I), (e)(5) and (e)(8) of the Privacy Act would impose the following requirements on law enforcement agencies: (1) to maintain only such records about an individual as necessary to accomplish a purpose required by statute or executive order, (2) to get information directly from the individual to the greatest extent practicable when information may be adverse, (3) when it seeks information from an individual, to tell him its authority and whether disclosure is mandatory or voluntary, the purpose for which the information will be used, the routine uses which may be made of it, and the effects on him of not providing the information, (4) to maintain records accurately and fairly, and (5) to try to serve notice on an individual when any record about him is disclosed under compulsory legal process.[21] Considering the wider access and administrative rigors of the Privacy Act, we have no difficulty understanding why Congress allowed law enforcement agencies to restrict individual access to whole systems of records under the Privacy Act, while allowing the public, including the first party, more limited access to some of the same material under FOIA.

21. Section (q) of the Privacy Act, 5 U.S.C. § 552a(q), forbids an agency from relying on any of the censoring devices of FOIA. Therefore unless subsection (j)(2) authority is exercised, a first party will have far greater access to records about himself under the Privacy Act than under FOIA.

B. *The Legislative History*

We agree with the district court that the legislative history of the Privacy Act is not without ambiguities. Contrary to the district court, however, we feel that, on balance, the legislative history supports our interpretation that section (j)(2) of the Privacy Act ought not be considered a FOIA withholding statute for first party requesters.

In support of its decision that section (j)(2) was a FOIA Exemption 3 statute, the district court relied on the fact that

> [A] provision [S. 3418, 93d Cong., 2d Sess., § 205(b) (1974)] of an earlier bill passed by the Senate [, which] clearly prohibited use of the Privacy Act to withhold information disclosable under other statutes, including, presumably, FOIA . . .[,] was deleted from the final version of the bill, suggesting that Congress did not intend to prohibit use of the Privacy Act for such purposes.

Greentree, 515 F.Supp. at 1148.

We do not agree with the district court's reading of the legislative history. Our reading indicates that throughout its consideration of the Privacy Act, the Senate struggled to hold separate the Privacy Act and FOIA, and further, that that effort was ultimately successful.

The privacy bill that emerged from the Senate Committee contained two provisions that could be read to safeguard disclosure rights under FOIA: (1) Section 205(b), which remained in the final Senate bill, prohibited agencies from "withholding . . . any personal information which is required to be disclosed by law or any regulation thereunder," *reprinted in* Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579), Source Book on Privacy 143 (1976) (hereinafter Source Book); and (2) Section 202(c), subsequently eliminated by a "perfecting amendment," Source Book at 765, which provided that certain requirements for disclosure did "not apply when

disclosure would be required or permitted pursuant to . . . [the] Freedom of Information Act . . . ." *Reprinted in* Source Book at 139. The Senate Report explained that

> [Section 202(c)] was included to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press. The Committee believed it would be unreasonable and contrary to the spirit of the Freedom of Information Act to attempt to keep an accounting of the nature and purpose of access and disclosures involving the press and public or to impose guarantees of security and confidentiality on the data they acquire.
>
> While the Committee intends in this legislation to implement the guarantees of individual privacy, it also intends to make available to the press and public all possible information concerning the operations of the Federal Government in order to prevent secret data banks and unauthorized investigative programs on Americans.

S.Rep.No.1183, 93d Cong., 2d Sess. 71 (1974), U.S.Code Cong. & Admin.News 1974, p. 6916, 6985, *reprinted in* Source Book at 224. Accompanying section 202(c) was a provision that prohibited agencies from relying upon FOIA to withhold information under the Privacy Act, S. 3418, 93d Cong., 2d Sess., § 205(a), *reprinted in* Source Book at 143. That provision, which survived at section 205a(q) of the final Act, was explained by the Senate Report as follows:

> *Subsection 205(a).* Shows the Committee's intent that the exemptions provided in the Freedom of Information Act to the required disclosure of Federal information on certain subjects, and that permitted for protection of personal privacy may not be used as authority to deny an individual personal information otherwise available under this Act.

S.Rep.No.1183, 93d Cong., 2d Sess. 71, 77 (1974), U.S.Code Cong. & Admin.News 1974, p. 6991, *reprinted in* Source Book at 230. These provisions in the Senate bill clearly indicate to us that the Senate wanted to insure that FOIA and the Privacy Act not interfere with one another. On the one hand, the Privacy Act's limits or conditions on disclosure were not to impede access under FOIA, section 205(b), and on the other, FOIA's exemptions were not to limit the availability of personal information accessible under the Privacy Act, section 205(a).

The privacy bill that emerged from the House Committee, was tilted more toward securing personal privacy than the Senate bill. The House bill, H.R. 16373, 93d Cong., 2d Sess., § 552a(b) (1974), stated that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." *Reprinted in* Source Book at 279. That provision, identical to the one now found in the Privacy Act, 5 U.S.C. 552a(b), did not exempt information required to be disclosed under FOIA. However, the House Committee, recognizing the impact this legislation would have on FOIA by making "all individually identifiable information in Government files exempt from public disclosure," [22] expressed its desire that agencies continue to make some kinds of individually-identifiable records available to the public:

> [The Committee] believes that the public interest requires the disclosure of some personal information. Examples of such information are certain data about government licensees, and the names, titles, salaries, and duty stations of most Federal employees. The Committee merely intends that agencies consider the disclosure of this type of information on a category-by-category basis and allow by

22. H.R.Rep.No.1416, 93d Cong., 2d Sess. 13 (1974), *reprinted in* Source Book at 306. The Report explained that "[s]uch information could be made available to the public only pursuant to rules published by agencies in the Federal Register permitting the transfer of particular data to persons other than the individuals to whom they pertain."

published rule only those disclosures which would not violate the spirit of the Freedom of Information Act by constituting "clearly unwarranted invasions of personal privacy."

H.R.Rep.No.1416, 93d Cong., 2d Sess. 13 (1974), *reprinted in* Source Book at 306.

After negotiations between the House and Senate, the House bill was adopted, but with two significant amendments. One amendment—now section 552a(b)(2)—modified the House's restriction on disclosure so that the Privacy Act would not interfere with public access under FOIA. The other amendment—now section 552a(q)—mirrored 552a(b)(2) by prohibiting agencies from relying upon FOIA to withhold any record otherwise available under the Privacy Act. *See* n.14 *supra*. The compromise was explained to both Houses of Congress in this way:

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section.
>
> A related amendment taken from the Senate bill would prohibit any agency from relying upon any exemption contained in Section 552 to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

Source Book at 861 (explained to Senate by Senator Ervin), 989 (explained to House by Representative Moorhead). The net effect of the compromise was to reinstate the essence of the Senate Committee's original provisions, sections 202(c) and 205(a) and (b), holding separate each act's exemptions from disclosure. And we find no reason to rule that first party requesters were intended to be an exception to that general Congressional "hold separate" policy. In the absence of persuasive evidence to the contrary, we conclude from this review that Congress meant to continue business as usual with respect to access under FOIA.[23]

Finally, we cannot accept the district court's announcement that "[s]ince the Privacy Act was passed after the amendments to (b)(7) of FOIA, any conflict between the two sections must be resolved in favor of the Privacy Act." *Greentree*, 515 F.Supp. at 1148. The temporal relationship of the FOIA Exemption 7 amendment and the Privacy Act suggests to us that no such conflict exists. The FOIA Exemption 7 amendment, which increased access to some of the same law enforcement records that might be totally exempt from access under Privacy Act section (j), was passed only a few weeks before the Privacy Act. *See* 1974 U.S.Code Cong. & Admin.News 6267, 6290–92. Indeed, Congress was considering the Privacy Act while it was preparing to override President Ford's veto of the 1974 FOIA amendments. *See* Source Book at 887 (Remarks of Rep. Erlenborn: "I think it is rather fitting that this [Privacy] bill comes to the floor today on the same day that we considered a motion to override and have overridden the President's veto of the Freedom of Information Act."). Presi-

23. As evidence to the contrary, the government cites statements made during the floor debates indicating a desire to keep certain intelligence and investigative files away from the individual to whom the files pertain. Further, the government relies upon the placement of section (b)(2) among Privacy Act provisions concerning public disclosure. Government's Brief at 20–23, 33. That evidence has been considered above and here we need reiterate only that (1) FOIA also limits access to national intelligence and investigatory files, and (2) that while it may be accurate to say that Congress was unaware that first parties might invoke section (b)(2) of the Privacy Act to secure FOIA access to records unavailable to them under section (j)(2) of the Privacy Act and that the right of public access to personal information was the preeminent concern of section (b)(2), it is apparent also that Congress meant to "preserve the status quo . . . regarding the disclosure of personal information" and refused to place the Privacy Act in the path of "any person" seeking access to information under FOIA. *See* p. 81 *supra*.

dent Ford's veto was, for the most part, a response to the increased accessibility of national security and law enforcement documents allowed by these 1974 amendments of Exemptions 1 and 7. 10 Weekly Comp. of Pres.Doc. 1318 (1974). Therefore, we are hard pressed to accept an interpretation of the Privacy Act that in effect repeals, for first party requesters, those amendments only a few weeks after they were enacted over a Presidential veto. Repeal by implication is not generally favored; less so in this instance.

C. *Post-Passage Developments* [24]

Shortly before the Privacy Act took effect, Deputy Assistant Attorney General Mary C. Lawton of the Office of Legal Counsel advised the Internal Revenue Service that the Privacy Act was the exclusive means available to an individual who sought information about himself. Source Book at 1177–78. The Office of Management and Budget—which was required by section 6 of the Privacy Act to develop guidelines and regulations for agencies implementing the Act and to provide assistance and oversight of the Act's implementation—circulated Lawton's opinion to federal agencies. *Id.* at 1178. When it came to the attention of Senator Edward Kennedy, the Senator forwarded a strong letter of protest to Attorney General Edward Levi. Kennedy charged that the opinion was "pernicious and destructive." His understanding was that

> access under the Privacy Act is to be complete and not subject to FOIA exemptions, where the Privacy Act grants access. But where the Privacy Act does not grant access, the FOIA—and its exemptions—apply.

Id. at 1180. Senator Kennedy attached to his letter of protest a Congressional Research Service Study for the Senate Subcommittee on Administrative Practice and Procedure on the relationship between FOIA and the Privacy Act, which took issue with the position taken by Deputy Assistant Attorney General Lawton. That study concluded:

> There is nothing in the terms of the Privacy Act or its legislative history which indicates that the Privacy Act is the exclusive means by which an individual can gain access to his own records contained in a system of records. Many of the so-called "inconsistencies" listed in the Justice Department's letter have been reconciled with the FOIA in the OMB guidelines issued pursuant to the Privacy Act. Furthermore, they do not seem to constitute the clear repugnancies which are necessary before a court will hold that one statute has implicitly repealed or superseded another.
>
> The primary purpose of the Privacy Act is the protection of individual privacy by controlling the collection, management, and dissemination of individually identifiable records. Access to such records by the individual is one method by which control is achieved and is a necessary adjunct to the accurate maintenance of records. It flies in the face of the whole legislative effort in this area to construe the Privacy Act as a backhanded method to limit individual access to records while at the same time preserving potentially greater access rights to third parties.

Id. at 1187.

Until this appeal, the dispute had resolved itself into a mere matter of form. Deputy Attorney General Harold R. Tyler, Jr., replying to Senator Kennedy for the Attorney General, admitted that he himself and others in the Department of Justice had "substantially similar" "concern[s]" about the Lawton opinion and so had drafted a Privacy Act regulation, *see id.* at 1187–88 (draft form), which, as slightly revised, now provides:

> Any request by an individual for information pertaining to himself shall be processed solely pursuant to this Subpart

24. The post-passage legislative and administrative material discussed below was significant enough to cause Senator Kennedy to have it reprinted on the pages of the Congressional Record. *See* Source Book at 1173–88.

D. To the extent that the individual seeks access to records from systems of records which have been exempted from the provisions of the Privacy Act, the individual shall receive, in addition to access to those records he is entitled to receive under the Privacy Act and as a matter of discretion as set forth in paragraph (a) of this section, access to all records within the scope of his request to which he would have been entitled under the Freedom of Information Act, 5 U.S.C. 552, but for the enactment of the Privacy Act and the exemption of the pertinent systems of records pursuant thereto.

28 C.F.R. § 16.57(b). That regulation was, however, accompanied by a statement claiming that release of records beyond those mandated by the Privacy Act was at the sole discretion of the Associate Attorney General.[25] The government now seeks to recapture its purported authority. The Lawton letter and the "discretionary" nature of the regulation are cited as "contemporaneous construction by the Justice Department . . . that the Privacy Act exemptions could not be circumvented through use of the FOIA." Government's Brief at 40.

Although agency interpretations are entitled to judicial respect, courts need not be oblivious to the context in which those interpretations are made.[26] In the case of major parts of the Privacy Act, as well as the FOIA amendments, the executive branch had opposed passage. *See, e.g.*, Source Book at 772–75. The post-passage events reviewed above may illustrate executive department efforts to moderate the impact of an unwelcome enactment. Of course, we are not unaware that the post-passage views of members of Congress and Congressional staffs may also be distorted by conflicting interests. *See Zipes v. Trans World Airlines, Inc.*, — U.S. —, —, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982). We are, therefore, wary of placing too much reliance on the Lawton-Kennedy-Tyler dialogue. More impressive to us is the fact that the predominant government policy since initial implementation until this appeal[27] has been to allow an individual to seek access to information about himself through both the Privacy Act and FOIA.[28]

25. 28 C.F.R. § 16.57(a):
Issuance of this section and actions considered or taken pursuant hereto are not to be deemed a waiver of the Government's position that the materials in question are subject to all of the exemptions contained in the Privacy Act. By providing for exemptions in the Act, Congress conferred upon each agency the option, at the discretion of the agency, to grant or deny access to exempt materials unless prohibited from doing so by any other provision of law. Releases of records under this section, beyond those mandated by the Privacy Act, are at the sole discretion of the Associate Attorney General and of those persons to whom authority hereunder may be delegated. Authority to effect such discretionary releases of records and to deny requests for those records as an initial matter is hereby delegated to the appropriate system managers as per the Notices of Systems of Records published in 40 Federal Register 167, pages 38703–38801 (August 27, 1975).

26. *Office of Consumers' Counsel v. Federal Energy Regulatory Comm'n*, 655 F.2d 1132, 1133, 1141 (D.C.Cir.1980); *Public Service Comm'n of New York v. Federal Energy Regulatory Comm'n*, 642 F.2d 1335, 1342 (D.C.Cir.1980), *cert. denied*, — U.S. —, 102 S.Ct. 360, 70 L.Ed.2d 189 (1981).

27. The Government's Brief to the district court, J.A. 29, 35, supported the position that the Privacy Act was not an Exemption 3 statute, citing "the Government's uniform and long-standing practice" to the contrary. It also argued, J.A. 96, that:
It would be anomalous indeed for Congress to override a presidential veto, which was in part based on Congress' narrowing of exemption 7, only to reinstate forty days later (via the Privacy Act) the discretionary power to deny total access to investigatory material. There is no indication whatsoever in the Legislative history of the Privacy Act to indicate that Congress intended such an abrupt reversal of its recent narrowing of exemption 7.

28. Pursuant to Rule 28(j) of the Fed.R.App. Proc., the government has informed us that the Office of Management and Budget ("OMB") is currently revising its guidelines to state that the Privacy Act should be considered a FOIA Exemption 3 statute. At present, OMB's policy is consistent with the policy of 28 C.F.R. § 16.57(b), *i.e.*, an individual's access to material about himself may be by way of the Privacy Act or FOIA:
In some instances under the Privacy Act an agency may (1) exempt a system of records (or a portion thereof) from access by individuals in accordance with the general or specific exemptions (subsection (j) or (k)); or (2)

D. *Case Law*

Although decisions in two other circuits, on which the district court relied, have resolved questions similar to this one in a different manner, neither has explicated a convincing rationale. The Seventh Circuit

> deny a request for access to records compiled in reasonable anticipation of a civil action or proceeding or archival records (subsection (d)(5) or (1)). In a few instances the exemption from disclosure under the Privacy Act may be interpreted to be broader than the Freedom of Information Act (5 U.S.C. 552). In such instances the Privacy Act should not be used to deny access to information about an individual which would otherwise have been *required* to be disclosed to that individual under the Freedom of Information Act.
>
> . . . .
>
> It is our view that agencies should treat requests by individuals for information pertaining to themselves which specify either the FOIA or the Privacy Act (but not both) under the procedures established pursuant to the Act specified in the request. When the request specifies, and may be processed under, both the FOIA and the Privacy Act, or specifies neither Act, Privacy Act procedures should be employed. The individual should be advised, however, that the agency has elected to use Privacy Act procedures, of the existence and the general effect of the Freedom of Information Act, and of the differences, if any, between the agency's procedures under the two Acts (e.g., fees, time limits, access and appeals).
>
> The net effect of this approach should be to assure the individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment.

40 Fed.Reg. 56742–43.

Other agencies and individuals prominently involved in the passage and implementation of the Privacy Act and FOIA have expressed a similar point of view—that the Privacy Act ought not operate as a FOIA Exemption 3 statute. Reporting to the House of Representatives on a Library of Congress study on the administration of FOIA, Representative Bella Abzug informed her colleagues that unfortunately "seven executive branch entities . . . [have] 'cited the Privacy Act 146 times when invoking the FOI Act exemption pertaining to statutory prohibitions.'" "Yet," said Abzug, "the Privacy Act specifically states that it was not intended to restrict access to records available under the Freedom of Information Act (5 U.S.C. 552a(b)(2))." 122 Cong.Rec. 26447, 26448 (1976). The Report submitted to the House by Abzug declared that Exemption 3 use of the Privacy Act was improper. *Id.* at 26450. (*The Administration of the Freedom of Information Act: An Analysis of the Executive Branch Annual Reports for 1975*). It noted optimistically, however, that one of the seven entities—the Department of Labor—which had invoked the Privacy Act as an Exemption 3 statute, had recently recognized that the practice was "improper." *Id.* Further, the Privacy Protection Study Commission, established by section 5 of the Privacy Act to study the functioning of the Act, indicated a similar understanding of the relationship between the Privacy Act and FOIA:

> An individual seeking access to an investigatory file, for example, may be able to obtain much broader access if he requests it under the FOIA, because the corresponding PA exemption applies to entire systems of records rather than to records or portions of the records they contain.

Report of the Privacy Protection Study Commission, Privacy Act of 1974: An Assessment, App. 4 at 37 (1977). Also, the Staff of the Senate Subcommittee on Administrative Practice and Procedure reported on violations of FOIA, including "improper reliance on the Privacy Act as statutory authority to withhold information under FOIA exemption 3." Staff of Senate Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, 95th Cong., 2d Sess., *Report on Oversight Hearings on Agency Implementation of the 1974 Amendments to the Freedom of Information Act*, at 123 (Comm. Print 1980). The Staff noted that "[t]he Privacy Act . . . was never intended to restrict access to reports under FOIA." *Id.* at n.76. In support, the *Annual Report, 1976* of the Congressional Research Service was cited:

> An equally disturbing phenomenon, which also occurred in 1975 and 1976, is agency reliance upon the Privacy Act to withhold information in conjunction with the intervening statute exemption of the Freedom of Information law. It appears that the Justice Department, Federal Power Commission, National Aeronautics and Space Administration, and the National Science Foundation engaged in this practice in a few isolated instances. It should be quite apparent by this time that the Privacy Act does not constitute authority to withhold any records sought under the provisions of the FOI statute. The Freedom of Information Act recognizes the unwarranted invasion of personal privacy as a basis (5 U.S.C. 552(b)(6)) for exempting information from disclosure, but does not rely upon the language or authority of the Privacy Act."

Id., citing Annual Report, 1976 at 25. Thus, the prevailing understanding among those intimately involved in the implementation of the Privacy Act—exclusive of the executive branch—was that the Privacy Act and FOIA were independent bases for access by individuals to their own records.

in *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980), interpreted section (k)(2) of the Privacy Act to exempt information from required disclosure under FOIA, concluding:

> Although the Freedom of Information Act does not contain a comparable exemption, we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt.

Id. at 216. Unfortunately, we do not have the benefit of the court's statutory analysis, review of the legislative history or any other aspect of its reasoning. Had such reasons been disclosed, we would certainly have paid them close attention.[29]

29. Professor Davis has criticized the decision for failing to take careful note of the statutory wording:

> The court quoted (k)(5), but in doing so it deleted the words that would have prevented it from making its error. The crucial words the court deleted are here italicized: "The head of any agency may promulgate rules . . . to exempt any system of records within the agency from [specified] subsections . . . *of this section.*" The exemption is from parts of a section of the PA, and the court assumed it to be from a disclosure requirement of the FOIA.

1 K. Davis, Administrative Law Treatise § 5:43, p. 53 (1978 ed. Supp. 1980). On the more general question whether the Privacy Act is an Exemption 3 statute, legal scholars uniformly answer no. *See, e.g.*, Guidebook to the Freedom of Information and Privacy Acts 21 (P. Bouchard and J. Franklin, eds. 1980) ("An individual may utilize either the Privacy Act or FOIA or both to seek access to information about himself in agency records, and is entitled to the cumulative total of access rights under the two Acts."); 2 J. O'Reilly, Federal Information Disclosure, Procedure, Forms and the Law § 20.13 [20–30–31] (1981 ed.) (after rehearsing the history of the Kennedy-Lawton debate, O'Reilly observed:

> Kennedy won the debate, but Justice conceded the issue in its discretion, in a manner which Kennedy said "bordered on the irresponsible".[21] The precedential effect of a formal reversal was lacking, but Justice amended its regulations to provide that any individual's request for records would be dealt with under whichever statute provided the greater access, if the request was made by an individual for his own files.[22] The FOIA provisions which give greater access rights than the corresponding provisions of the Privacy Act would be triggered automatically whenever a request could fall within both of the statutes.
>
> A novel construction of the Privacy Act FOIA interrelationship was suggested in 1979. The Government Printing Office denied access to the Code of Federal Regulations mailing list on the grounds that the Privacy Act was a (b)(3) specific exemption to the Freedom of Information Act.[22a] The history of the Privacy Act and of the 1976 FOIA amendments is silent on this claim, but it appears to be wholly inconsistent with the purposes of both statutes. The Privacy Act was not intended to be an excuse for agency withholding under the FOIA, and the GPO approach remains to be tested in the courts, where it may well lose.
>
> The case law since enactment of the Privacy Act has not added much to the substance of the intermeshing of the two statutes' operations. Several courts have addressed the interaction, in the context of discovery and similar motions, and have found that the Privacy Act adds nothing to the rights of litigating parties which the FOIA did not already provide.[23]
>
> A startling difference of opinion between the early commentators and the staff of the Privacy Protection Study Commission developed when that Commission's final report found that the two Acts "mesh well", and that "there are no statutory conflicts".[24] The PPSC rejected the legal literature's criticism as "overly simplistic" and "an erroneous formulation of the relationship between the two statutes".[25] Time will tell which view was "overly simplistic", though few cases have faced the issues. The Commission Report concluded that some practical problems would arise but that an agency merely lost the discretion to disclose (b)(6)-exempt information once it had determined that it was exempt.[26] The simplicity in the Commission staff's reading of the conflict or nonconflict lies in the recognition that few if any agency managers would knowingly disclose personal privacy types of data, such as medical records, which would be a *clearly unwarranted invasion* of the file subject's recognized rights if disclosed! Case-by-case judgments will have to be made, and the Privacy Act will probably be seen by legal scholars of the future as an impediment to the rational development of (b)(6) policies and cases.

21 [121 Cong Rec S] 18146 [(daily ed. Oct. 9, 1975).]

The Fifth Circuit in *Painter v. Federal Bureau of Investigation*, 615 F.2d 689, 691 & n.3 (5th Cir. 1980), relied heavily upon *Terkel* to hold section 552a(k)(5) a FOIA Exemption 3 statute. In so holding, the court reversed a district court decision containing a more detailed review of the legislative history of the Privacy Act.[30]

We have been persuaded to break stride with the Fifth and Seventh Circuits by the language and legislative history of the Privacy Act. We have sought a coherent statutory relationship between the Privacy Act and FOIA that reflects a steady intent by Congress throughout the short period between enactment of the Privacy Act and the 1974 FOIA amendments. That intent was to open access to first party requesters under the Privacy Act without closing existing avenues of access under contemporaneously enacted and liberalizing amendments to FOIA. In reality, however, our departure from the position of other circuits may turn out to be of more academic interest than practical consequence. Upon remand, it may well be found that the material sought by Greentree is unavailable to him (or anyone else) under FOIA's Exemption 7 as well as the Privacy Act. Whether this dispute deserves such an anticlimactical ending, we leave to the district court.

[22] See 28 CFR § 16.57[.]

[22a] Letter of GPO Order Div. Chief L Reed to author (June 15, 1979)[.]

[23] *Sears Roebuck & Co. v. GSA*, 553 F.2d 1378 (D C Cir.1977); *U S v Brown* 562 F.2d 1144 (9th Cir. 1977); *U S v Murdock* 548 F2d 599 (5th Cir. 1977)[.]

[24] Privacy Comm Report at 520[.]

[25] Id.[.]

[26] Id., and it conceded that other private information would be nonexempt[.]

O'Reilly also took note of the district court opinion in this case and stated:

> An extensive treatment of the issue of specific exemption from the Freedom of Information Act for Privacy Act materials appears in *Greentree v. U. S. Customs Service*, 515 F.Supp. 1145 (D C D C 1981). That court overruled both the agency and the requester and specifically held that the Privacy Act is an exemption (3) statute. (5 U.S.C. § 552(b)(3).) In doing so, it overruled administrative opinions and even this text to reach its conclusion that (b)(3) applies. The appellate outcome of this case will be very interesting.);

see also, Hulett, *Privacy and the Freedom of Information Act*, 27 Adm.L.Rev. 275, 288 (1975); Project, *Government Information and the Rights of Citizens*, 73 Mich.L.Rev. 971, 1337 (1975); Note, *The Privacy Act of 1974: An Overview*, 1976 Duke L.J. 301, 312; Note, *FOIA-Privacy Act Interface*, 8 Loyola Univ.L.J. 568, 586–93 (1977).

30. The district court found:

> Far from indicating that the Privacy Act was intended to shield materials from public disclosure which were otherwise accessible under the FOIA, the legislative history of the former states that the statute "is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section (FOIA)." Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, 120 *Cong.Rec.* 12,243, 12,244 (daily ed. Dec. 18, 1974); *id.* at 21,815, 21,817 (daily ed. Dec. 17, 1974). It thus appears that the Privacy Act provides rights to the individual with respect to his records beyond the point where access by the public to such records ends and was not intended to restrict his rights as a member of that public. Buttressing this conclusion is 5 U.S.C. § 552a(b)(2), which provides that, although many records about an individual cannot be disclosed under the Privacy Act without the individual's consent, if disclosure is called for under the FOIA, no consent need be obtained. *See* Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed Reg. 28,948, 28,954 (July 9, 1975). This provision, like the legislative history, indicates that the Privacy Act is not to be used to block disclosures required by the more general Freedom of Information Statute.
>
> The court therefore concludes the material covered by the Privacy Act exemptions do not, without more, fall within exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3), which protects documents "specifically exempted from disclosure by statute . . . ." While it is true that there is some tension between the two statutes, and that the literal wording of exemption 3 can be read to include the Privacy Act, the court cannot ignore the legislative history and the general structure of these laws.

Reported at 615 F.2d at 689–90 n.2.

CONCLUSION

[2] For the foregoing reasons, we hold that section (j)(2) of the Privacy Act is not a FOIA Exemption 3 statute. Therefore, the decision of the district court is *reversed* and the case is *remanded* so that the court may consider access to the documents in question under other applicable sections of FOIA.

Reversed and Remanded.

f the Privacy Act and endments. That intent to first party requesters Act without closing ex- cess under contempora- nd liberalizing amend- n reality, however, our position of other circuits of more academic inter- consequence. Upon re- e found that the materi- ntree is unavailable to) under FOIA's Exemp- : Privacy Act. Whether s such an anticlimactical the district court.

s quo as interpreted by the he disclosure of personal r that section (FOIA)." : and Senate Compromise e Federal Privacy Act, 120 12,244 (daily ed. Dec. 18, 5, 21,817 (daily ed. Dec. 17, pears that the Privacy Act the individual with respect nd the point where access uch records ends and was strict his rights as a mem- . Buttressing this conclu- 552a(b)(2), which provides ny records about an indi- disclosed under the Privacy ndividual's consent, if dis- r under the FOIA, no con- ined. *See* Privacy Act Im- idelines and Responsibil- . 28,948, 28,954 (July 9, ion, like the legislative his- t the Privacy Act is not to disclosures required by the edom of Information Stat-

ore concludes the material rivacy Act exemptions do . fall within exemption 3 of nformation Act, 5 U.S.C. protects documents "spe- from disclosure by statute s true that there is some he two statutes, and that g of exemption 3 can be he Privacy Act, the court legislative history and the of these laws.

d at 689-90 n.2.

access to information about an individual which would otherwise have been *required* to be disclosed to that individual under the Freedom of Information Act.

. . . . . .

It is our view that agencies should treat requests by individuals for information pertaining to themselves which specify either the FOIA or the Privacy Act (but not both) under the procedures established pursuant to the Act specified in the request. When the request specifies, and may be processed under, both the FOIA and the Privacy Act, or specifies neither Act, Privacy Act procedures should be employed. The individual should be advised, however, that the agency has elected to use Privacy Act procedures, of the existence and the general effect of the Freedom of Information Act, and of the differences, if any, between the agency's procedures under the two Acts (e.g., fees, time limits, access and appeals).

The net effect of this approach should be to assure the individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than that they had prior to its enactment.

40 Fed.Reg. 56742–43 (1975). Thus the contemporaneous interpretation of the Privacy Act by an agency charged by Congress with specific responsibility for the development of guidelines and regulations for the Act's implementation is entirely consistent with the interpretation which the Justice Department formerly embraced. According to the Justice Department (*see* Brief at 35), the Office of Management and Budget is now considering a revision of those guidelines. That does not alter the value of the extant guidelines as a reflection of the contemporaneous understanding of the agency as to the intention of the ninety-third Congress. *See Greentree, supra,* 674 F.2d 74, 85 & n. 28.

We conclude, therefore, that the trial court erred in holding that the Privacy Act was the sole means of access for individual records and that the systems of records exemption of 5 U.S.C. § 552a(j)(2) (1982) applied to an individual Freedom of Information Act request. Thus the *Vaughn* index should have been disclosed to the requesters, and the procedures mandated by *Ferri v. Bell,* 645 F.2d 1213, 1220 (3d Cir. 1981), followed.

IV.

The summary judgment in favor of the Department of Justice will be reversed, and the case remanded for further proceedings consistent with this opinion.

PROVENZANO, Anthony, Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, William French Smith, Attorney General of the United States, and William H. Webster, Director of the Federal Bureau of Investigation.

No. 82–5681.

United States Court of Appeals,
Third Circuit.

Argued Aug. 4, 1983.

Decided Sept. 15, 1983.

On Appeal from the United States District Court for the District of New Jersey—Newark; Clarkson S. Fisher, Judge.

Harvey Weissbard, West Orange, N.J., for appellant.

J. Paul McGrath, Asst. Atty. Gen., Washington, D.C., W. Hunt Dumont, U.S. Atty., Newark, N.J., Leonard Schaitman, Douglas Letter (argued), Attys., Civ. Div., Dept. of Justice, Washington, D.C., for appellees.

Before GIBBONS and HUNTER, Circuit Judges, and MANSMANN,* District Judge.

OPINION OF THE COURT

PER CURIAM:

In April of 1978 Anthony Provenzano submitted a Freedom of Information Act request to the Department of Justice for all documents indexed under or containing his name. In July of 1980 he appealed to the Attorney General from the failure of the Criminal Division to respond to his request, and was informed that since it would take 25 months before the request could be processed, he could regard his appeal as denied, and bring action in an appropriate federal court.

In December 1981 Provenzano filed the instant action. The government moved for summary judgment, filing in support thereof affidavits of Douglas S. Wood and James C. Felix, which established that the requested records were in a system of records exempted by agency action pursuant to 5 U.S.C. § 552a(j)(2) (1982). The trial court, relying on *Painter v. Federal Bureau of Investigation*, 615 F.2d 689 (5th Cir.1980), and rejecting the authority of *Greentree v. United States Customs Service*, 674 F.2d 74 (D.C.Cir.1982), granted summary judgment, and Provenzano appealed.

In *Porter v. Department of Justice*, 717 F.2d 787 (3d Cir.1983), filed simultaneously herewith, we hold that the Privacy Act did not *pro tanto* repeal the Freedom of Information Act insofar as the latter provides access for requesters to information about themselves. That holding requires that the summary judgment in this case be reversed.

The judgment appealed from will be reversed and the case remanded for further proceedings.

Opinion on rehearing, 722 F.2d 36.

* Hon. Carol Los Mansmann, United States District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES of America, Appellee,

v.

Allen C. MORROW, Appellant.

Appeal of Sarah F. MORROW.

Nos. 82-3477, 82-3478.

United States Court of Appeals, Third Circuit.

Argued July 21, 1983.

Decided Sept. 16, 1983.

As Amended Sept. 23, 1983.

Certiorari Denied Jan. 16, 1983. See 104 S.Ct. 975.

Defendants were convicted in the United States District Court for the Middle District of Pennsylvania, Richard P. Conaboy, J., of one count of conspiracy and 12 substantive counts of mail fraud in connection with the intentional destruction of an adult bookstore and thus subsequent efforts to collect on fire insurance policies covering the property, and they appealed. The Court of Appeals, Teitelbaum, Chief District Judge, sitting by designation, held that: (1) combination of kerosene fumes and gasoline which was created during an arson constituted an "incendiary device" and thus an "explosive" under federal law, and (2) where agreement proven was to destroy a building and to collect, by use of the mails, insurance proceeds payable only for accidental destruction of the building, count charging conspiracy was not duplicitous on theory that conspiracy to commit mail fraud and conspiracy to use an explosive to commit mail fraud were separate and distinct conspiracies.

Affirmed.

1. Explosives ⇐4

Combination of kerosene fumes and gasoline which was created during an arson

Dassinger v. South Central Bell Telephone Co., 505 F.2d 672, 674 (5th Cir. 1974); 10 C. Wright & A. Miller, Federal Practice & Procedure § 2713 (1973). On remand, the district court should expunge its initial judgment and enter an order dismissing the case for want of subject matter jurisdiction.

REMANDED.

James Joseph PAINTER, Plaintiff-Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION et al., Defendants-Appellants.

No. 79-2570
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

April 18, 1980.

Appeal was taken from summary judgment entered by the United States District Court for the Northern District of Georgia, Newell Edenfield, District Judge, in action in which former special agent of Federal Bureau of Investigation sought, pursuant to Freedom of Information Act, to obtain access to records pertaining to his dismissal. The Court of Appeals, Randall, Circuit Judge, held that material exempted from disclosure under provisions of Privacy Act were matters "specifically exempted from disclosure by statute."

Reversed in part and remanded with instructions.

Records ⇐55

Material exempted from disclosure under provisions of Privacy Act were matters "specifically exempted from disclosure by statute," for purposes of Freedom of Information Act, 5 U.S.C.A. §§ 552(b)(3), 552a.

Leonard Schaitman, Atty., Mark N. Mutterperl, Howard S. Scher, U. S. Dept. of Justice, Washington, D. C., for defendants-appellants.

Larry W. Thomason, Decatur, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

This appeal raises the narrow question whether the Privacy Act, 5 U.S.C. § 552a, is a "statute" within the meaning of one provision of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(3). That subsection of the FOIA provides that the FOIA does not apply to matters that are "specifically exempted from disclosure by statute," as long as the exempting statute meets certain basic requirements.[1] The district court below determined that the Privacy Act was not such a statute, and accordingly ordered the Federal Bureau of Investigation to disclose the material Painter sought under the FOIA as to which the Government claimed a Privacy Act exemption applied.[2]

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

1. 5 U.S.C. § 552(b)(3) provides that the disclosure provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1976) do not apply to matters that are "specifically exempted from disclosure by statute (other than § 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld . . . ."

2. In its unreported decision in this case, the district court said:

> Far from indicating that the Privacy Act was intended to shield materials from public disclosure which were otherwise accessible under the FOIA, the legislative history of the

Appellee, James Painter, was a special agent of the FBI dismissed on October 18, 1977 for several reasons not relevant on this appeal. He invoked the provisions of the FOIA to obtain access to records pertaining to his dismissal. The FBI released a number of documents to him, but asserted that portions of those documents and certain other documents were exempt from disclosure. The Government maintained that some of the withheld information was exempt from disclosure under exemption (b)(6) of the FOIA, 5 U.S.C. § 552(b)(6), and that other information was exempt under exemption (k)(5) of the Privacy Act, 5 U.S.C. § 552a(k)(5). The district court granted summary judgment in favor of the Government with regard to all documents and portions of documents as to which the FOIA exemption had been asserted, and granted summary judgment for Painter with regard to all documents and portions of documents as to which the Privacy Act exemption had been asserted. Reviewing the legislative history of the Privacy Act, which was enacted later than the FOIA, the district court correctly concluded that the Privacy Act was intended to provide "rights to the individual with respect to his records beyond the point where access by the public to such records ends and was not intended to restrict his rights as a member of that public." Reasoning that it would therefore be anomalous to permit the Government to rely on the Privacy Act to block a disclosure that would otherwise be required by the FOIA, the district court finally concluded that the Privacy Act was not the kind of statute referred to in 5 U.S.C. § 552(b)(3).

With that conclusion we disagree. Subsequent to enactment of the FOIA, Congress passed two other open records acts that are relevant here. The Privacy Act, enacted in 1974, is one. The other is the Government in the Sunshine Act (Sunshine Act), 5 U.S.C. § 552b. Congress was clearly aware that these various open records acts overlapped in places. When it enacted the Privacy Act, for example, Congress specifically provided that no agency could rely on an FOIA exemption to withhold from an individual any record to which that individual would otherwise be entitled under the provisions of the Privacy Act. 5 U.S.C. § 552a(q). Similarly, when in 1976 Congress enacted the Sunshine Act, it amended the provision of the FOIA with which we are now concerned to specify that exemptions under the Sunshine Act could not be asserted to block disclosure under the FOIA. Government in the Sunshine Act, Pub.L. No. 94-409, § 5(b), 90 Stat. 1247 (amending 5 U.S.C. § 552(b)(3)).

The district court inferred that Congress did not intend Privacy Act exemptions to be applicable in FOIA cases. We reach the

former states that the statute "is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section (FOIA)." Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, 120 *Cong.Rec.* 12,243, 12,244 (daily ed. Dec. 18, 1974); *id.* at 21,815, 21,817 (daily ed. Dec. 17, 1974). It thus appears that the Privacy Act provides rights to the individual with respect to his records beyond the point where access by the public to such records ends and was not intended to restrict his rights as a member of that public. Buttressing this conclusion is 5 U.S.C. § 552a(b)(2), which provides that, although many records about an individual cannot be disclosed under the Privacy Act without the individual's consent, if disclosure is called for under the FOIA, no consent need be obtained. *See* Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed.Reg. 28,948, 28,954 (July 9, 1975). This provision, like the legislative history, indicates that the Privacy Act is not to be used to block disclosures required by the more general Freedom of Information Statute.

The court therefore concludes the material covered by the Privacy Act exemptions do not, without more, fall within exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3), which protects documents "specifically exempted from disclosure by statute . . . ." While it is true that there is some tension between the two statutes, and that the literal wording of exemption 3 can be read to include the Privacy Act, the court cannot ignore the legislative history and the general structure of these laws. *See generally Train v. Colorado Public Interests Research Group, Inc.*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976). Given this conclusion, defendants must supply plaintiff with those documents for which they have claimed only an exemption under 5 U.S.C. § 552a(k)(5).

opposite conclusion.[3] Congress has obviously been aware of the interplay between these various open records acts, and in the instances just noted it specifically indicated when the exemptions of one act should not apply to disclosures mandated by another. We therefore decline inferentially to limit the scope of 5 U.S.C. § 552(b)(3) where Congress has not specifically indicated an intent to do so.

Accordingly, we reverse the district court's summary judgment in favor of Painter, and remand with instructions to consider the applicability of the Privacy Act exemption (k)(5), 5 U.S.C. § 552a(k)(5), to the material sought by Painter as to which the government claimed the Privacy Act exemption applied.

REVERSED in part and REMANDED with instructions.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, a Non-Profit Corporation, under the laws of California, Plaintiff-Appellant,

v.

John McLEAN and Nancy McLean, Defendants-Appellees.

No. 79-2629
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 18, 1980.

In a slander suit, plaintiff moved to disqualify one of defendant's two attorneys. The United States District Court for the Middle District of Florida, Wm. Terrell Hodges, J., denied the motion and plaintiff appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) the attorney's consulting with the plaintiff about a zoning matter did not bar his representing the defendant in this case where there was no evidence that any issue in this case was ever discussed with the attorney or that he had any confidential information about it, and (2) the appeal was frivolous and the defendant was entitled to damages caused by the appeal, including a reasonable attorney's fee and double costs.

Affirmed.

1. Attorney and Client ⇐21

Lawyer need not disqualify himself in matter concerning former client unless terminated employment had some substantial relationship to pending suit or unless he had received some privileged information.

2. Attorney and Client ⇐32

To warrant disqualification of counsel, there must be showing of reasonable possibility that some specifically identifiable impropriety occurred and likelihood of public suspicion must be weighed against interest in retaining counsel of one's choice. ABA Code of Professional Responsibility, Canon 9.

3. Attorney and Client ⇐21

Defense counsel in slander suit was not required to disqualify himself because plaintiff had previously consulted with him about a zoning matter where there was no evidence that any issue in slander case was

3. We note that in a recent case, *Terkel v. Kelley*, 599 F.2d 214 (7th Cir. 1979), the Seventh Circuit reached the same result we have arrived at here. That court said:

> Although the Freedom of Information Act does not contain a comparable exemption [to Privacy Act exemption (k)(5)], we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt.

599 F.2d at 216. Our holding, however, is not so broad. We only hold that material exempted from disclosure under the provisions of the Privacy Act are matters "specifically exempted from disclosure by statute" under 5 U.S.C. § 552(b)(3).

* Fed.R.App.P. 34(a); 5 Cir. R. 18.

gued, be accomplished by means of an "executive sanction." *See* note 9 *supra*. Significantly, the subcommittee itself explained that the additional deterrent value associated with an action by the government for a penalty would serve "no worthwhile purpose." *See* p. 779 *supra*.

Conceivably, the subcommittee could have reached this conclusion because it assumed that the United States already had available a far more powerful enforcement weapon: the right to sue for the invalidation of a patent. The cost of invalidation—here the patented product generates some $190 million in annual sales, *see* note 2 *supra*—dwarfs the proposed $5,000 fine. But it seems improbable that the subcommittee simply assumed the existence of such an important executive sanction. After having expressly considered and rejected the Justice Department's proposal to include a statutory "right of action in the United States" to penalize noncompliance with Section 135(c), *see* p. 779 *supra*, the subcommittee failed to specify any other executive sanction. This evidence suggests that if the subcommittee assumed anything, it assumed that statutory silence would entirely foreclose enforcement of section 135(c) by the United States.

V.

[7] Analysis of the first two *Cort* factors leads to the conclusion that Congress did not intend that the United States enforce section 135(c). Since neither the language nor legislative history of the provision suggests an intent to authorize enforcement by the government, it is not necessary to "trudge through all four of the [*Cort*] factors," *Merrill Lynch, supra*, 456 U.S. at 388, 102 S.Ct. at 1844, to decide that section 135(c) gives no implied right of action to the United States.

We are not unmindful of the government's contention that enforcement of section 135(c) would be strengthened if a cause of action were granted to the United States as well as to private plaintiffs. Patent litigation is very expensive and private parties generally will be unable to discover "secret" interference settlements without becoming involved in such litigation. Accordingly, there may be merit to the government's prediction that some patentholders will safely violate section 135(c) unless the United States is permitted to enforce the statute. But in view of the separation of powers concerns associated with judicially inferring a cause of action from a silent statute, and in view of the Supreme Court's restrictive approach to implied remedies since *Cort v. Ash*, the federal courts may no longer recognize an implied right of action solely because it would advance the purpose of a statute. *See California v. Sierra Club, supra*, 451 U.S. at 297–98, 101 S.Ct. at 1781. That decision is for Congress to make. If Congress desires that the United States play a role in the enforcement of section 135(c), it may so provide expressly. In the absence of an express provision, we decline to infer one now.

The order of the district court holding that the United States may sue to enforce section 135(c) will be reversed, and the case remanded to the district court with instructions to dismiss the complaint for failure to state a claim. In light of this decision, we do not reach the merits of the complaint.

PORTER, Judith R. and Porter, Gerald J., Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE.

No. 82-1833.

United States Court of Appeals, Third Circuit.

Argued Aug. 4, 1983.

Decided Sept. 15, 1983.

Plaintiffs who had sought release of information concerning them in the files of

the FBI brought Freedom of Information Act action. The United States District Court for the Eastern District of Pennsylvania, Charles R. Weiner, J., 551 F.Supp. 595, entered judgment in favor of government and plaintiffs appealed. The Court of Appeals, Gibbons, Circuit Judge, held that: (1) summary judgment was inappropriate with respect to claim of exemption under exemption 1 of the Freedom of Information Act, and (2) Privacy Act provision for person's access to his own records did not pro tanto repeal the Freedom of Information Act access provisions with respect to first-party requests.

Reversed.

1. Federal Civil Procedure ⇐2481

Where, if *Vaughn* index had been disclosed to plaintiffs in Freedom of Information Act action, counsel would have been able to raise certain questions about it, where court could then have considered appropriateness of limited discovery, and where consideration discovery was appropriate because the only investigation allegedly took place over ten years earlier whereas classification stamps were not placed on documents until after plaintiffs' requests, summary judgment on the issue of whether the information was exempt was inappropriate. 5 U.S.C.A. § 552.

2. Records ⇐62

Husband's and wife's requests for FBI search for material pertaining to either of them and for release of the material pursuant to the Freedom of Information Act should not be construed simply as to first-party requests, especially where husband had previously sought copy of any file which the Bureau had on him or his wife. 5 U.S.C.A. § 552.

3. Statutes ⇐223.1

Privacy Act and Freedom of Information Act are reconcilable by reading the special remedy in the Privacy Act as serving to vindicate privacy interests in a special manner while leaving standing the preexisting Freedom of Information Act remedy providing access to information for its own sake. 5 U.S.C.A. §§ 552, 552a(d).

4. Records ⇐31

Provision of the Privacy Act requiring each agency which maintains a system of records to allow individuals to gain access to their records was not a pro tanto repeal of the Freedom of Information Act and is not the sole means of access for first-party information. 5 U.S.C.A. §§ 552, 552a(d).

5. Statutes ⇐219(6)

Where Department of Justice's interpretation of Privacy Act and Freedom of Information Act interrelationship had vacillated and where Justice Department was not the only federal agency with obligations under the Privacy Act, it could not claim a presumption in favor of its interpretation of the Act based on alleged expertise in respect to a statute which it was charged with administering. 5 U.S.C.A. § 552a.

Raymond J. Bradley (argued), Brian P. Flaherty, H. Robert Fiebach, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pa., for appellants.

Peter F. Vaira, Jr., U.S. Atty., Philadelphia, Pa., J. Paul McGrath, Asst. Atty. Gen., Leonard Schaitman, Douglas Letter (argued), Attys., Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C., for appellees.

Cornish F. Hitchcock, Alan B. Morrison, Public Citizen Litigation Group, Washington, D.C., for amicus curiae Freedom of Information Clearinghouse.

Before GIBBONS and HUNTER, Circuit Judges, and MANSMANN,* District Judge.

OPINION OF THE COURT

GIBBONS, Circuit Judge:

Judith R. Porter and Gerald J. Porter of Ardmore, Pennsylvania, appeal from a sum-

* Hon. Carol Los Mansmann, United States District Judge for the Western District of Pennsylvania, sitting by designation.

mary judgment in favor of the Department of Justice in their suit under the Freedom of Information Act, 5 U.S.C. § 552 (1982), to compel disclosure of information about them in the files of the Federal Bureau of Investigation. The trial court granted summary judgment on two grounds: that the Privacy Act, 5 U.S.C. § 552a (1982), is a nondisclosure statute within the meaning of the Freedom of Information Act; and that in any event the material sought is exempt from disclosure under the Freedom of Information Act. We reverse, and remand for further proceedings.

I.

In March of 1981 Mr. Porter wrote to the FBI Freedom of Information Act Director requesting copies of any files kept on him or his wife. The letter indicated that it was his understanding that the FBI investigated them in 1972. On May 11, 1981, the Chief of the FBI Records Management Division informed them that the central records system at FBI Headquarters in Washington revealed no information indicating that they had ever been subject to investigation by the Bureau. The request was forwarded to the Bureau's Philadelphia Office. On June 4, 1981, that office informed the Porters that a "main" file concerning Judith R. Porter had been located, and that this file contained a reference to Gerald.

The file was referred to FBI Headquarters, which on June 18, 1981, informed the Porters that Judith R. Porter was the subject of a limited security investigation, initiated to determine if any activity on her part constituted a risk to national security. They were also informed that the investigation was closed after it was determined that no such risk existed, and that the file contained a reference to Gerald. Finally, they were told that the file consisted of five pages, all of which was classified pursuant to the national defense and foreign policy exemption to the Freedom of Information Act.[1]

The Porters filed an administrative appeal to the Office of Privacy and Information Appeals of the Department of Justice, pointing out that it was a total mystery to them what activity they had engaged in could have prompted an investigation of their risk to national security. They requested that if their appeal be denied, the government inform them:

1. On what date was the investigation of Judith R. Porter begun and when was it concluded;

2. What activity or activities of Judith R. Porter prompted the investigation;

3. Do the five pages of classified information contain letters written by Judith R. Porter, transcripts of public statements made by Judith R. Porter, or newspaper reports of her activities;

4. Do the references to Gerald J. Porter pertain to activities in which he engaged or are they simply a mention of the fact that he is the spouse of Judith R. Porter; and

5. At what future date is it anticipated that the file will be declassified?

On September 30, 1981, the Acting Director of the Office of Privacy and Information Appeals ruled:

> After careful consideration of your appeal, I have decided to affirm the initial action in this case. The material pertaining to you is classified and I am affirming the denial of access to it on the basis of 5 U.S.C. [§] 552(b)(1). This material, along with a copy of your appeal letter, is being referred to the Department Review Committee to determine whether it warrants continued classification under Executive Order 12065. You will be notified of the Committee's final decision results in the declassification of any information....

1. 5 U.S.C. § 552(b)(1) provides:
> This section does not apply to matters that are—(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;....

The September 30, 1981 letter advised the Porters of their right to seek judicial review of the ruling, and on June 18, 1982 they filed their complaint in this action.

In answer to the complaint the Department of Justice contended for the first time that the Freedom of Information Act did not afford the Porters a remedy, but that the Privacy Act of 1974, 5 U.S.C. § 552a (1982), is their exclusive remedy. The Department contended, as well, that under the Privacy Act the materials sought were exempt from disclosure. Moreover, according to the Justice Department, even if the Freedom of Information Act were to apply to the Porters, the materials would be exempt under 5 U.S.C. § 552(b)(3) (1982), which provides that the Act does not apply to matters

> (3) specifically exempted from disclosure by statute ..., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;....

According to the Justice Department, section (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2) (1982), is such an exemption statute.

The Porters served interrogatories seeking to learn the basis for the Justice Department's claim of exemption. These the Department refused to answer. Instead it moved for a protective order on which the trial court never ruled. While the motion was pending the Department moved for summary judgment, relying on the affidavit of Special Agent Douglass Ogden. This affidavit was served on the Porters.

The Ogden affidavit recounted the administrative history of Porter's information request and described generally the manner in which the five page file was retrieved. As to the file's contents, Ogden stated:

> One FBIHQ "main" file containing the results of the Philadelphia FBI investigation was located wherein Judith R. Porter was the subject. This file reflected a preliminary investigation initiated to determine if a specific activity of Judith R. Porter constituted a risk to national security. The investigation was predicated upon possible violations of Federal law, including, but not limited to, Title 18, U.S.C., Sections 792 *et seq.* (Espionage); 2152 *et seq.* (Sabotage); Title 22, U.S.C., Section 611 *et seq.* (Foreign Agent Registration Act); and Title 50, U.S.C., Section 401 *et seq.* (National Security Act of 1947). The investigation was closed after it was determined that no violation of Federal law had occurred and that Judith R. Porter constituted no risk to the national security.

Ogden also stated that the requested records were maintained in the Bureau's Central Record System which has by regulation been exempted from access pursuant to exemption (j)(2) of the Privacy Act, 5 U.S.C. § 552a(j)(2) (1982). He stated further that the file fell within Freedom of Information Act exemption 1, covering national defense and foreign policy materials. Finally, Ogden noted that after the lawsuit began the Bureau had reviewed the file and declassified "a small amount of material." The declassified material was not revealed, however, because in the Department's view the entire file, even though partly declassified, was still covered by Privacy Act exemption (j)(2).

The Porters attempted to depose Agent Ogden, but the Department moved for a protective order, which on October 13, 1982, the trial court granted, pending its *in camera* inspection of the file.

Following the court's order staying Ogden's deposition and ordering the Department to provide the file for its inspection, the Department furnished the court, *ex parte*, with two affidavits of Robert Peterson, a Special Agent in the FBI National Security Affidavits Unit. The Department explained that the first Peterson affidavit, dated September 23, 1982, was intended to serve as a public *Vaughn* index in compliance with *Ferri v. Bell*, 645 F.2d 1213, 1220 (3d Cir.1981), *modified on other grounds*, 671 F.2d 769 (3d Cir.1982), and *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), *cert. de-*

nied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), but was being withheld from the Porters to avoid the contention that furnishing an affidavit required by the Freedom of Information Act was a waiver of the claimed exemption under the Privacy Act. Since it was relying on the Privacy Act, the Department insisted it had no obligation to furnish a *Vaughn* index.[2] The second Peterson affidavit, dated October 20, 1982, was furnished to assist the Court in its examination of the five page file, which was furnished simultaneously. The second affidavit is not in the record and its contents have not been disclosed.

Peterson's September 23, 1982 affidavit contends that the documents in the file were properly classified under Executive Order 12356 which went into effect in August 1982, because (1) they concerned intelligence activities, sources, or methods, and foreign relations of the United States; and (2) their disclosure could be expected to cause damage to the national security. Peterson segregated out minor portions of the documents that could be declassified under Freedom of Information Act exemption 1. What was declassified was the home address of Mr. and Mrs. Porter, their respective ages, their race, their height, the color of their hair and eyes, and the conclusion, "In view of the above, no further investigation is believed warranted at this time and captioned case is being closed." Every other part of the file, including the dates of the documents, Peterson alleged to be properly classified as exempt from disclosure under Freedom of Information Act exemption 1.

The district court examined the file *in camera* and concluded that the documents had been properly classified under exemption 1 pursuant to an Executive Order. The court also held that, because the Privacy Act exemption applied, the Porters were not entitled to see even those portions of the documents which had been declassified. Thus summary judgment was entered in favor of the Department.[3]

II.

The Justice Department, after the Porters appealed to this court, concluded that it would furnish them with copies of one Peterson affidavit, and with copies of the contents of the file, redacted so as to eliminate all material except that referred to above. Pointing to this disclosure, it contends that if we can affirm on the basis of Freedom of Information Act exemption 1 there is no need to reach the broader exemption which it claims under the Privacy Act.[4] Thus our first inquiry is whether we can affirm the summary judgment insofar as it applies to the redacted portions of the documents.

What is immediately apparent from the face of the redacted documents is that they bear classification stamps, with dates and initials, possibly of the classifying officers. The earliest legible date is 5/22/81, but there are a number of later dates, extending through 8/27/82. The classification stamps made in August of 1982 bear the initials RFP, which are, perhaps, those of the affiant Robert F. Peterson. Other initials include rpm, KJ, VRT, and WR. Still others are illegible, and some have been redacted. Peterson's affidavit gives no explanation about the significance of these stamps and initials, or of the identity of the persons whose initials appear. He does not say whether, in exercising his judgment to excise the entire contents of the documents except as noted above, he relied on the judgment of those persons. He does not explain what the significance of their notations is. Thus he does not disclose whether, if the notations have to do with classification, their conclusions and his coincided.

The Peterson September 23, 1982 affidavit sets out in considerable detail the development of a four-symbol exemption 1 code

2. See the discussion in Part II, *infra*, on the difference in scope of the claimed exemptions.

3. *See* Porter v. United States Department of Justice, 551 F.Supp. 595, 600 (E.D.Pa.1982).

4. In Provenzano v. Department of Justice, 717 F.2d 799 (3d Cir.1983), argued on the same day as this case, the Privacy Act issue is squarely presented, because no disclosure whatever has been made.

to explain handwritten notations on the face of the redacted version of the documents. The Code is as follows:

(b)(1)C 1 Intelligence Source Contact Dates

(b)(1)C 2 Intelligence Source Singular Identifier/Identifiers

(b)(1)C 3 Information Relating to Intelligence Source Data Collection Capability

(b)(1)C 4 Detailed Information Pertaining to or Provided by an Intelligence Source that Could Reasonably Be Expected to Identify the Source if Disclosed

(b)(1)C 5 Channelization/Dissemination Instructions For Intelligence Source Information

(b)(1)D 1 Information Gathered in the Course of Activity by the United States Aimed at Obtaining Intelligence Information About or From a Foreign Country, Organization, Group or Individual

There are at least forty notations of (b)(1)D 1. There is one notation (b)(1)C 1, three notations (b)(1)C 2, three notations (b)(1)C 3, two notations (b)(1)C 4, and two notations (b)(1)C 5. Thus it appears that only one deletion was required to conceal the date of an intelligence source contact, only three deletions were required to conceal the identity of an intelligence source, only three deletions of information related to intelligence source data collection capability, only two deletions of information might have revealed the identity of an intelligence source, and only two deletions of information related to channelization/dissemination instructions. Moreover in the instances where C 1 through C 4 notations appear, the symbols refer to the same information. Only in three places is information deleted which would allegedly disclose intelligence sources. The vast bulk of the deletions fall into the category "Information Gathered in the Course of Activity by the United States Aimed at Obtaining Intelligence Information About or From a Foreign Country, Organization, Group or Individual."

The Code is a part of an exemption 1 catalog, and that catalog explains that category (b)(1)D 1 deals with the foreign relations or foreign activities of the United States. It describes the information as "Information Gathered in the Course of Activity by the United States Aimed at Obtaining Intelligence Information About or From a Foreign Country, Organization, Group, or Individual." Literally, the category of information includes information completely unrelated to foreign relations, if it happens to have been gathered "in the course of activity by the United States" which is somehow related to intelligence. Perhaps so literal a reading of the catalog is not intended. In discussing the logical nexus between disclosure and damage to national security, however, the catalog states:

> This category of information can be sensitive in nature. This condition exists in part due to the delicate nature of international diplomacy. This information must be handled carefully so as not to jeopardize the fragile relationships that exist between the United States and certain foreign governments. It is my judgment that the disclosure of this information could reasonably be expected to impact negatively on United States foreign relations and result in damage to the national security.

There is considerable ambiguity here, and it is not removed by the cross reference at the end of the quoted passage to page Y of the Catalog.[5] Moreover the ambiguity is com-

5. That reference states:

> The unauthorized disclosure of information concerning foreign relations or foreign activities of the United States can reasonably be expected to, *inter alia:*
>
> (a) Lead to foreign diplomatic, economic and military retaliation against the United States;
>
> (b) Identify the target, scope and time frame of intelligence gathering activities of the United States in or about a foreign country, resulting in the curtailment or cessation of these activities;
>
> (c) Enable hostile entities to assess United States intelligence gathering activities in or about a foreign country and devise countermeasures against these activities;
>
> (d) Compromise cooperative foreign sources, jeopardize their safety and curtail the flow of information from these sources;

pounded when the redacted papers are compared with the Ogden affidavit, which was disclosed to the Porters. While the Ogden affidavit relies on the Justice Department's interpretation of the Privacy Act as affording a blanket exemption for whole systems of records, it actually discloses that Judith Porter was investigated for possible espionage, 18 U.S.C. §§ 792–799 (1976), possible sabotage, 18 U.S.C. §§ 2152–2156 (1976 & Supp. V 1981), and possible violations of the National Security Act of 1947, as amended, 50 U.S.C. §§ 401–426 (1976 & Supp.V 1981). Thus the Peterson affidavit, purporting to furnish a *Vaughn* index in compliance with the concededly narrower nondisclosure provisions of the Freedom of Information Act, actually discloses less about the contents of the file than the Ogden affidavit on which the Justice Department relies for the broader Privacy Act exemption which it claims.

[1] We recognize that there is tension between the discovery provisions of the Federal Rules of Civil Procedure and the Freedom of Information Act exemptions from disclosure. But we have held, along with most courts which have considered the issue, that Congress did not intend to leave a requester "helpless to contradict the government's description of information or effectively assist the trial judge." *Ferri v. Bell,* 645 F.2d 1213, 1222 (3d Cir.1981). Had the Peterson *Vaughn* index been disclosed, counsel would have been able to raise the questions about it which we have noted above. The trial court could then have considered the appropriateness of limited discovery such as has been ordered by some courts. *See, e.g., Stein v. Department of Justice,* 662 F.2d 1245, 1253 (7th Cir.1981); *Phillippi v. Central Intelligence Agency,* 546 F.2d 1009, 1013, 1014 n. 12 (D.C.Cir.1976); *Schaffer v. Kissinger,* 505 F.2d 389, 391 (D.C.Cir.1974); *Murphy v. Federal Bureau of Investigation,* 490 F.Supp. 1134, 1136 (D.D.C.1980). Consideration of some discovery would appear to be particularly appropriate in this instance, in which the Porters allege that the only investigation took place over a decade ago, while the classification stamps were placed on the documents only after their March 1981 request. The Peterson affidavit, and the redacted documents, demonstrate the need for further inquiry. A summary judgment that Freedom of Information Act exemption 1 applies is inappropriate. Fed.R.Civ.P. 56(f).

III.

Since we have concluded that the summary judgment cannot be affirmed on the authority of exemption 1 of the Freedom of Information Act, we must consider the Justice Department's alternative position that the Privacy Act authorizes nondisclosure. Section 3 of that Act added to Title 5 of the United States Code, section 552a.

A. The Justice Department:

Interpretation of the Privacy Act

The Department's position depends upon the interrelationship of three subsections of section 552a. The first provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> (2) required under section 552 of this title [the Freedom of Information Act];. . . .

5 U.S.C. § 552a(b) (1982). This subsection implements the basic policy of the Privacy Act, announced in the legislative findings, of safeguarding constitutionally recognized individual privacy rights.[6] It prohibits dis-

> (e) Endanger citizens of the United States who might be residing or traveling in the foreign country involved;
> resulting in damage to the national security.

6. In Section 2(a) of the Privacy Act Congress found that:

> (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
>
> (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm

closure of the contents of systems of records [7] pertaining to individuals except with their consent, unless the disclosure falls in one of eleven separate categories. The second exception is disclosure mandated by the Freedom of Information Act. The plain language of section 552a(b)(2) is that the prohibition on disclosure in the Privacy Act is inapplicable to Freedom of Information Act requests. The Department of Justice concedes that this is so with respect to a Freedom of Information Act request made by anyone in the world other than the individual who is identified in a system of records.

The second relevant subsection provides:

> Each agency that maintains a system of records shall—
>
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, . . .;
>
> (2) permit the individual to request amendment of a record pertaining to him . . .;
>
> (3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal . . . .

5 U.S.C. § 552a(d) (1982). Section 552a(d) implements the congressional policy of minimizing harm to individuals flowing from the maintenance of inaccurate information about them in a system of records which even under the strictures of section 552a(b) may be disseminated to eleven categories of recipients. This access provision is relevant to the instant case because it is the Justice Department's position that it is a *pro tanto* repeal of the Freedom of Information Act. The Department concedes that until the Privacy Act individuals could, under the Freedom of Information Act, gain access to records pertaining to themselves, subject only to the exemptions contained in that statute. It now urges, contrary to the position it took until sometime late in 1981, that section 552a(d) of the Privacy Act eliminated that Freedom of Information Act right, and became, for individuals, the sole means of access to records pertaining to themselves. That being the case, the Department urges, the exception in section 552a(b)(2), preserving access through the Freedom of Information Act, should be read as applicable to every requester in the world except the individual named in a system of records.

The third Privacy Act subsection on which the Department of Justice relies provides:

> The head of any agency may promulgate rules . . . to exempt any system of records within the agency from any part of this section except subsection (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10) and (11), and (i) if the system of records is—
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws . . . .

5 U.S.C. § 552a(j)(2) (1982); *see also* 5 U.S.C. § 552a(k)(2) (1982). The Department of Justice has adopted regulations pursuant to section 552a(j)(2), exempting

> to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;
>
> (3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;
>
> (4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
>
> (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.
>
> Privacy Act of 1974, Pub.L. No. 93–579, § 2(a), 88 Stat. 1896, 1896.

7. 5 U.S.C. § 552a(a)(5) (1982) provides:

> [T]he term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual; . . . .

the entire Central Record System of the FBI. 28 C.F.R. § 16.96 (1982). Since the listing of exceptions in section 552a(j) does not include section 552a(d), it is the Department's position that by the adoption of these regulations the files of the FBI are totally exempt from disclosure to a section 552a(d) requester. That being the case, there is no need to furnish a *Vaughn* index to any such requester or to disclose non-sensitive portions of records.

It is not the Department's position that promulgation of 28 C.F.R. § 16.96 (1982) created a blanket Freedom of Information Act exception for FBI files. That position would be inconsistent with the plain language both of section 552a(b)(2) and of other parts of the Privacy Act such as section 552a(c)(1), which unequivocally contemplate the continued operation of the Freedom of Information Act.[8] Rather, the Department's reliance on section 552a(j) depends entirely upon its contention that section 552a(d) was a *pro tanto* repeal of the Freedom of Information Act, by making section 552a(d), for individuals, the sole means of access to records in which they are mentioned. It concedes that any third party could, under the Freedom of Information Act, and subject to its specific exemptions, gain access to the same records. It concedes, moreover, that a corporation or partnership could obtain information about itself under the Freedom of Information Act.

B. The Porters' Request

[2] The initial request, signed by Mr. Porter alone, read "Please send me a copy of any file you have on me or my wife—Judith Porter." The government's responses establish that there is no file on Mr. Porter. Thus, *prima facie,* we are dealing with a third-party request by Porter for a file on Mrs. Porter. In their complaint, however, the Porters allege that "[O]n March 18, 1981, pursuant to the Freedom of Information Act ('FOIA'), Mr. and Mrs. Porter requested that a search of the records of the Federal Bureau of Investigation for material pertaining to either of them be undertaken and that any such material be released to them." The Department of Justice would have us construe the request by Porter as having been made by both Porters, each for his or her own file. We do not think the quoted allegation in the complaint can fairly be so construed. The complaint relies solely on the Freedom of Information Act, and was drafted before the Porters were informed of the Department's contention that the Freedom of Information Act was inapplicable to first-party requests. Thus it would be fundamentally unfair to rely on the wording of the complaint to convert Mr. Porter's third-party request for the contents of the file on his wife into a first-party request.

The Department of Justice points out that in response to its form letter both of the Porters, on April 22, 1981, furnished written consent to the release of any documents in the FBI files pertaining to them. This was done in response to a sentence in the form letter:

> Before we can commence processing your request for records pertaining to another individual, we must know whether you have been authorized by that individual to receive these documents. It will be necessary for you to submit to the FBI the original of a written authorization which has been duly attested by a Notary Public.

Clearly the most that can be read into the Porters' April 22, 1981 response is that each was consenting to the release to the other of information in his or her own file. The response is entirely consistent with the position that Porter was pursuing a third-party request for the contents of his wife's file.

Finally, the Department of Justice urges that a husband's request for examination of the contents of his wife's file should be treated as a sham third-party request. Certainly we are not prepared to hold that this is so in every case as a matter of law, for no authority has been cited to us in support of so extraordinary a proposition. Arguably some ostensible third-party requests might

8. Section 552a(c)(1) excepts from the accounting requirements of the Privacy Act disclosures made under subsection (b)(2), that is, pursuant to the Freedom of Information Act.

as a matter of fact be made on behalf of a first-party requester. But the issue would be factual. In the summary judgment record before us, however, neither the Ogden affidavit which was revealed to the Porters nor the Peterson affidavit which was not revealed until appellees' brief was filed, suggests that the third-party request was a sham. The trial court, moreover, made no reference to the question whether Mr. Porter's request for his wife's record was a sham.

Thus on this record, even assuming that the Justice Department correctly construes section 552a(d) as a *pro tanto* repeal of the Freedom of Information Act, the summary judgment in its favor cannot stand. We are dealing with what on its face is a third-party rather than a first-party request. The Department concedes that the Freedom of Information Act applies to third-party requests.

C. The Proceedings on Remand

The Justice Department's position that Porter's request for the file on his wife may be a sham suggests that there will be further proceedings in an attempt to establish as much factually. That effort would involve the parties and the court in further time-consuming and expensive proceedings, proceedings which would be entirely fruitless if the Justice Department's contention that section 552a(d) is the exclusive access route for first-party requesters were to be rejected. Thus even though on the Department's own interpretation of the Privacy Act summary judgment cannot stand, it is appropriate to address the merits of that interpretation.[9]

Thus far three courts of appeals have considered the question whether the Privacy Act bars first-party access under the Freedom of Information Act to entire systems of records exempted by agency action. The first is *Terkel v. Kelly*, 599 F.2d 214 (7th Cir.1979), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980), in which without analysis the court simply stated the result.[10] The second is *Painter v. Federal Bureau of Investigation*, 615 F.2d 689 (5th Cir.1980), in which the court, without analysis, relied on *Terkel v. Kelly*. *Id.* at 691 n. 3. It was not until the Court of Appeals for the District of Columbia Circuit decided *Greentree v. United States Customs Service*, 674 F.2d 74 (D.C.Cir.1982), that any appellate court made a searching analysis of the interrelationship between the two statutes.

In *Greentree* the district court had held that section 552a(j) exemptions were "specifically exempted from disclosure by statute" within the meaning of section (b)(3) of the Freedom of Information Act, 5 U.S.C. § 552(b)(3) (1982). The court so held despite the fact that the Department of Justice did not agree with that interpretation. *Greentree v. United States Customs Service*, 515 F.Supp. 1145, 1148 (D.D.C.1981). On appeal the Justice Department changed its position. That change in position prompted Judge Wald to write extensively on the text and legislative history of the Privacy Act, and to conclude that the Department was simply wrong. We find Judge Wald's analysis entirely persuasive. No point would be served by duplicating it. We do, however, deem it appropriate to make some additional observations.

First, the text of the Privacy Act lends no real support to the Justice Department's interpretation. Section 552a(j) and section 552a(k) which authorize agencies to promulgate exemptions for systems of records both refer to exemptions only "from any part of this section." The plain language refers only to exemptions from the provisions of section 552a, not to any other section in Title 5, nor to any other disclosure statute.

9. *See* note 4 *supra*.

10. The *Terkel* court's analysis consists of this sentence:

> Although the Freedom of Information Act does not contain a comparable exemption [to section 552a(k)(5)], we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt.

599 F.2d at 216. No mention is made of 5 U.S.C. § 552a(b)(2) (1982).

Had Congress intended to authorize the creation by regulation of exemptions from the Freedom of Information Act it would have used language such as "this title" rather than "this section." Moreover the language in section 552a(b)(2) could hardly be clearer. This nondisclosure provision expressly excepts disclosures required under the Freedom of Information Act. The language Congress chose in section 552a(b)(2) of the Privacy Act simply cannot be tortured so as to convey an intention to repeal it in part. The Justice Department's contention that section 552a(b)(2) refers only to third-party requests is not apparent on the face of the statute. Even if it were to be so read, however, that reading would not support the inference that the section repeals any part of another statute. At most it would support the inference that for first-party requesters a request is the equivalent of consent.[11] Thus the Justice Department's entire construction depends on the language of the Privacy Act access provision, section 552a(d). There is not a word in that section suggesting that the special remedy which it provides for the vindication of the privacy rights which Congress identified in its legislative findings was to be exclusive of all other rights which the law might elsewhere provide.

[3] Since nothing in the language of section 552a(d) can be read as an express *pro tanto* repeal of the Freedom of Information Act, the Justice Department's effort must be considered as an attempt to find a *pro tanto* repeal by implication. The proponent of such a proposition is faced with the formidable barrier of the settled rule of statutory construction to the contrary. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168, 96 S.Ct. 1319, 1323, 47 L.Ed.2d 653 (1976). An implied repeal will be found " '(1) where provisions in the two acts are in irreconcilable conflict, ... and (2) if the latter act covers the whole subject of the earlier one and is clearly intended as a substitute ....' " *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976) (citing *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936)). That standard is not satisfied here. The Privacy Act and the Freedom of Information Act are perfectly reconcilable by reading the special remedy in section 552a(d) as serving to vindicate privacy interests in a special manner, while leaving standing the preexisting Freedom of Information Act remedy providing access to information for its own sake. Moreover the Privacy Act expressly states that it is not intended as a substitute for the Freedom of Information Act. Indeed its basic thrust is in an opposite direction. To a large extent, though not entirely, it is designed to discourage rather than encourage disclosure of information impinging upon the privacy of individuals. Given the strict rule against repeals by implication, a legislative intent to accomplish such a repeal in this instance would have to appear in the legislative history with overwhelming clarity. There is no such clarity.

There is a certain amount of ambiguity in the legislative history of the Privacy Act, with statements by members of Congress in which each side purports to find support. That legislative history is reprinted in Staff of Senate Comm. on Gov't Operations & House Comm. on Gov't Operations, Subcomm. on Gov't Information and Individual Rights, 94th Cong., 2d Sess., Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93–579), Source Book on Privacy (Joint Comm. Print 1976) [Source Book]. The Source Book reveals that the ambiguities arose primarily because the Senate and the House of Representatives adopted separate bills, S. 3418 introduced by Senator Ervin and H.R. 16373 introduced by Congressman Moorhead. *Id.* at 9,239. Each bill was amended in the chamber in which it originated. Eventually each chamber re-

11. Reference to exemption 3 of the Freedom of Information Act therefore adds nothing to the analysis. The Privacy Act is an exemption statute only if one accepts the proposition that section 552a(d) is the exclusive means of first-party access.

jected the bill passed by the other. Finally, shortly before the December 31, 1974 recess, a compromise bill was adopted, which included the provision in section 552a(b)(2), permitting disclosure, without the consent of an individual named therein, of records the disclosure of which was required by the Freedom of Information Act. *Id.* at 502. An equivalent provision had been included in the original H.R. 16373, but was deleted by the House Committee on Government Operations. *Id.* at 242–43, 279–80. Although the language of section 552a(b)(2) had not been a part of S. 3418, the Senate Bill as reported from the Committee on Government Operations did provide in section 205(b) that "[n]othing in this act shall be construed to permit the withholding of any personal information which is otherwise required to be disclosed by law or any regulation thereunder." *Id.* at 143. The intermediate version of H.R. 16373 as approved by the House Committee arguably would have applied Privacy Act exemptions to all Freedom of Information Act requests, while S. 3418 would have confined those exemptions to Privacy Act obligations. The compromise bill, restoring the original language of H.R. 16373, was obviously intended to adopt the policy embodied in section 205(b) of S. 3418, which applied to both first-party and third-party requests. The report accompanying the compromise bill notes:

> The Compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section.

Source Book, *supra*, at 861. Thus, as noted by the *Greentree* court, *see Greentree, supra*, 674 F.2d at 81, the enacted version of the Privacy Act reflects the successful effort to keep separate the exemptions in the Privacy Act and the Freedom of Information Act.

[4] We have searched the legislative history of all versions of S. 3418, H.R. 16373, and the compromise bill, which was enacted, and we have found nothing which suggests that Congress intended Privacy Act section 552a(d) to be a partial repeal of the Freedom of Information Act by making it the sole means of access for first-party information. The construction of the Privacy Act for which the Department of Justice contends depends, ultimately and completely, on clear evidence of such an intention. In no other manner can the "this section" language of section 552a(j) and (k) be stretched so as to apply to Freedom of Information Act requests made by first parties. Thus the legislative history of the Privacy Act utterly fails to overcome the presumption against repeals by implication.

[5] Nor can the Department of Justice rely on any supposed expertise with respect to the statute it is charged with administering. In the first place, as the *Greentree* court points out, that department's interpretation of the statute has vacillated. *Greentree, supra*, 674 F.2d at 84–85. Moreover, the Justice Department is not the only federal agency with obligations under the Privacy Act. Under section 6 of the Privacy Act, the Office of Management and Budget is charged with the responsibility for developing guidelines and regulations for the Act's implementation by government agencies. Privacy Act of 1974, Pub.L. No. 93–579, § 6, 88 Stat. 1896, 1909. Since 1975 those guidelines have provided:

> In some instances under the Privacy Act an agency may (1) exempt a system of records (or a portion thereof) from access by individuals in accordance with the general or specific exemptions (subsection (j) or (k)); or (2) deny a request for access to records compiled in reasonable anticipation of a civil action or proceeding or archival records (subsection (d)(5) or (1)). In a few instances the exemption from disclosure under the Privacy Act may be interpreted to be broader than the Freedom of Information Act (5 U.S.C. 552). In such instances the Privacy Act should not be used to deny

access to information about an individual which would otherwise have been *required* to be disclosed to that individual under the Freedom of Information Act.

. . . . . .

It is our view that agencies should treat requests by individuals for information pertaining to themselves which specify either the FOIA or the Privacy Act (but not both) under the procedures established pursuant to the Act specified in the request. When the request specifies, and may be processed under, both the FOIA and the Privacy Act, or specifies neither Act, Privacy Act procedures should be employed. The individual should be advised, however, that the agency has elected to use Privacy Act procedures, of the existence and the general effect of the Freedom of Information Act, and of the differences, if any, between the agency's procedures under the two Acts (e.g., fees, time limits, access and appeals).

The net effect of this approach should be to assure the individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than that they had prior to its enactment.

40 Fed.Reg. 56742–43 (1975). Thus the contemporaneous interpretation of the Privacy Act by an agency charged by Congress with specific responsibility for the development of guidelines and regulations for the Act's implementation is entirely consistent with the interpretation which the Justice Department formerly embraced. According to the Justice Department (*see* Brief at 35), the Office of Management and Budget is now considering a revision of those guidelines. That does not alter the value of the extant guidelines as a reflection of the contemporaneous understanding of the agency as to the intention of the ninety-third Congress. *See Greentree, supra,* 674 F.2d 74, 85 & n. 28.

We conclude, therefore, that the trial court erred in holding that the Privacy Act was the sole means of access for individual records and that the systems of records exemption of 5 U.S.C. § 552a(j)(2) (1982) applied to an individual Freedom of Information Act request. Thus the *Vaughn* index should have been disclosed to the requesters, and the procedures mandated by *Ferri v. Bell,* 645 F.2d 1213, 1220 (3d Cir. 1981), followed.

IV.

The summary judgment in favor of the Department of Justice will be reversed, and the case remanded for further proceedings consistent with this opinion.

PROVENZANO, Anthony, Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, William French Smith, Attorney General of the United States, and William H. Webster, Director of the Federal Bureau of Investigation.

No. 82-5681.

United States Court of Appeals,
Third Circuit.

Argued Aug. 4, 1983.

Decided Sept. 15, 1983.

On Appeal from the United States District Court for the District of New Jersey—Newark; Clarkson S. Fisher, Judge.

Harvey Weissbard, West Orange, N.J., for appellant.

J. Paul McGrath, Asst. Atty. Gen., Washington, D.C., W. Hunt Dumont, U.S. Atty., Newark, N.J., Leonard Schaitman, Douglas Letter (argued), Attys., Civ. Div., Dept. of Justice, Washington, D.C., for appellees.

Louis (Studs) TERKEL, Plaintiff-Appellant,

v.

Clarence KELLY, Edward Levi, The Federal Bureau of Investigation, and The Department of Justice, Defendants-Appellees.

No. 78-1313.

United States Court of Appeals, Seventh Circuit.

Argued Dec. 5, 1978.

Decided May 25, 1979.

Rehearing Denied June 29, 1979.

Action was brought to compel disclosure, under Freedom of Information Act, of material withheld by Federal Bureau of Investigation. The United States District Court for the Northern District of Illinois, Eastern Division, Frank J. McGarr, J., granted government's motion for summary judgment, and plaintiff appealed. The Court of Appeals, Bauer, Circuit Judge, held that: (1) affidavits furnished by FBI contained a sufficient description to establish that the contested information sought fell within Freedom of Information Act exemption concerning information properly classified under executive order in the interest of national defense or foreign policy; (2) affidavits furnished by FBI provided adequate information to establish that specific and identifiable portions of challenged documents fell within Freedom of Information Act and Privacy Act exemptions concerning investigatory records compiled for law enforcement purposes or investigatory material compiled solely for purpose of determining suitability, eligibility, or qualifications for federal civilian employment, and (3) where in at least three instances FBI withheld entire pages of investigative reports on grounds that pages would disclose names of investigating agents or the identities of confidential sources, but, in each of cases, it was not apparent from agency's affidavits why the pages could not be released after the identifying data had been deleted, such pages were appropriately subject to an in camera review by district court, under Freedom of Information Act.

Remanded for limited purpose; otherwise affirmed.

1. Records ⇐55
Statutes ⇐223.1

The Freedom of Information Act and the Privacy Act must be read together and the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt. 5 U.S.C.A. §§ 552, 552a(k)(5).

2. Record ⇐65

Affidavits furnished by Federal Bureau of Investigation contained a sufficient description to establish that the contested information sought fell within Freedom of Information Act exemption concerning information properly classified under executive order in the interest of national defense or foreign policy. 5 U.S.C.A. § 552(b)(1).

3. Records ⇐65

Affidavits furnished by Federal Bureau of Investigation provided adequate information to establish that specific and identifiable portions of challenged documents fell within Freedom of Information Act and Privacy Act exemptions concerning investigatory records compiled for law enforcement purposes or investigatory material compiled solely for purpose of determining suitability, eligibility, or qualifications for federal civilian employment. 5 U.S.C.A. §§ 552(b)(7)(D), 552a, 552a(k)(5).

4. Records ⇐66

Where in at least three instances Federal Bureau of Investigation withheld entire pages of investigative reports on grounds that pages would disclose names of investigating agents or the identities of confidential sources, but, in each of cases, it was not apparent from agency's affidavits why the pages could not be released after the identifying data had been deleted, such pages were appropriately subject to an in

camera review by district court, under Freedom of Information Act. 5 U.S.C.A. §§ 552(a)(4)(B), (b)(2), (b)(7)(C–E), 552a(k)(5).

Lance Haddix, Chicago, Ill., for plaintiff-appellant.

Thomas P. Sullivan, U. S. Atty., Antonio J. Curiel, Asst. U. S. Atty., Chicago, Ill., for defendants-appellees.

Before TONE, LAY,* and BAUER, Circuit Judges.

BAUER, Circuit Judge.

This is an appeal arising under the Freedom of Information Act, 5 U.S.C. § 552. The appellant Louis ("Studs") Terkel requested the Federal Bureau of Investigation to provide him with "a copy of all files in the FBI indexed or maintained under my name and all documents containing my name." The FBI released 146 pages of documents,[1] but withheld some material under provisions of the Act permitting non-disclosure. Terkel subsequently instituted an action in the district court to compel disclosure of the withheld material. After reviewing the affidavits and attachments, the district court granted the government's motion for summary judgment. On appeal, Terkel argues that the lower court erred in failing to conduct an *in camera* examination of the challenged material.

I.

A brief outline of the relevant statutory framework will provide a useful point of departure. In 1974 Congress amended the FOIA provisions that governed the role of a reviewing court in considering claims of exemptions under the Act. The 1974 revision provided that

> "the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B) (1974).

The Conference Report accompanying the amendments explained that "[w]hile *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate." S.Rep.No.93–1200, 93d Cong., 2d Sess. 9 (1974), U.S.Code Cong. & Admin.News, 1974, pp. 6267, 6287.

In the case at hand, the FBI has relied on several exemptions under the FOIA to withhold various documents or portions thereof from the appellant. One of the claimed exemptions is § 552(b)(1), which, as amended, exempts matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." On the role of the reviewing court in dealing with this exemption, the Conference Committee Report noted that

> "the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in Section 552(b)(1) cases under the Freedom of Information law, *will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.*" S.Rep.No.93–1200, 93d Cong., 2d Sess. 12 (1974) U.S.Code Cong. & Admin. News 1974, p. 6290 (emphasis added).

* The Hon. Donald P. Lay, Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

1. According to agency affidavits, the FBI had maintained two separate files on the appellant. One was compiled as a background investigation in connection with the appellant's application for employment with the FBI in 1934. The other was compiled in connection with an investigation of the appellant's "activities in support of racial equality and possible Communist causes" from 1945 to 1961.

In withholding other portions of the documents, the FBI relied on subparagraphs (C), (D) and (E) of § 552(b)(7). As amended, these subparagraphs provide that investigatory records compiled for law enforcement purposes may be withheld if the production of such records would

> "(C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures . . . ."

According to Senator Hart, who introduced the amended version of Exemption 7 on the Senate floor, the purpose of subparagraph (C) is to "protect the privacy of any person who is mentioned in the requested files, and not only the person who is the object of the investigation." *Freedom of Information Act and Amendments of 1974 (P.L. 93–502) Source Book, Legislative History, Texts and Other Documents,* Joint Committee Print, 94th Cong., 1st Sess. 334 (hereinafter cited as Sourcebook). Similarly, the purpose of subparagraph (D) is to protect

> "the identity of a person other than a paid informer . . . if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information." Conf.Rep.No. 93–1380, 93d Cong., 2d Sess.; Sourcebook, p. 230.

It is noteworthy that under subparagraph (D) the agency can withhold not only the identity of the source but also the "confidential information" that he supplies. As Senator Hart explained:

> "The agency not only can withhold information which would disclose the identity of a confidential source but also can provide blanket protection for any information supplied by a confidential source . . . . *[A]ll the FBI has to do is to state the information was furnished by a confidential source and it is exempt.*" Sourcebook, p. 332 (emphasis added).

It is also significant that courts have construed this provision to apply to commercial institutions and non-federal law enforcement agencies that supply confidential information as well as to individuals. *See Nix v. United States,* 572 F.2d 998, 1005 (4th Cir. 1978); *Church of Scientology of California v. United States,* 410 F.Supp. 1297, 1302–03 (C.D.Cal.1976).

[1] Finally, the FBI has invoked § 552a(k)(5) of the Privacy Act in withholding certain documents concerning the appellant's application for employment with the FBI. This provision states:

> (k) The head of any agency may promulgate rules . . . to exempt any system of records . . . if the system of records is—
>
> (5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, . . . but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence; . . . ."

Although the Freedom of Information Act does not contain a comparable exemption, we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt.

II.

As was noted earlier, while the FOIA provides for *in camera* inspections, "it is clear from the legislative history that this section merely 'permit[s] such *in camera* inspection at the discretion of the Court.'" *Weissman v. Central Intelligence Agency*, 184 U.S.App.D.C. 117, 121, 565 F.2d 692, 696 (1977). Thus, in determining whether the district court erred in refusing to conduct an *in camera* inspection, the key issue is whether the agency has provided a sufficient description of the contested information to establish that it logically falls within the category of the claimed exemption. *See Ray v. Turner*, 190 U.S.App.D.C. 290, 298, 587 F.2d 1187, 1195, n. 22 (1978).

[2] From our review of the record, we are satisfied that the FBI has dealt with the instant FOIA request in a responsible and conscientious manner. As the lower court stated in its memorandum opinion, the agency has furnished affidavits which contain

> "lengthy, detailed descriptions of all documents released, the nature of portions excised, the statutory source of the exemptions claimed, the reason the exemptions were claimed, and the standards used in applying the exemptions to individual document portions. In addition, the affidavit contains a document-by-document index in which each document is described, deleted portions are outlined as to quantity and general character, the statutory exemption claimed for each portion is notated, and the paragraph in the body of the affidavit which explains the application of the particular exemption to particular kinds of materials is cross-referenced. Further, filed simultaneously with the affidavits were copies of each document released to plaintiff, both in their entirety or with deletions which are clearly visible and from which it can readily be ascertained whether or not such portions are likely to contain the kinds of information the FBI claims they do."

Thus, for example, the index discloses that the agency withheld a part of Document 8[2] on the grounds that the information was currently and properly classified under Executive Order 11652 in the interest of national defense or foreign policy. § 552(b)(1). The affidavit of Special Agent James stated that the information contained in Document 8 "would reveal an intelligence source and reveal the FBI's interest in a foreign relations matter, the continuing protection of which is essential to the national security." The affidavit also stated that the document "was presented to the Departmental Review Committee for classification review on February 1, 1977, and the classification was upheld as to those portions described." We find this description sufficient to establish that the contested information falls within the § 552(b)(1) exemption, particularly since there is nothing in the record to raise the issue of good faith.[3]

[3, 4] By the same token, we find that the agency affidavits have generally provided adequate information to establish that specific and identifiable portions of the challenged documents fall within § 552(b)(2) or §§ 552(b)(7)(C), (D) and (E) of the FOIA, and that other portions fall within § 552a(k)(5) of the Privacy Act. However, we have discovered at least three instances in which the agency has withheld entire pages of investigative reports on the grounds that the pages would disclose the names of investigating agents or the identities of confidential sources.[4] In each of these cases, it is not apparent from the agency's affidavits why the pages cannot be

2. The document is described as an investigative report from the Special Agent in Charge, Chicago, to FBI headquarters, Washington, D.C., dated April 3, 1950.

3. In this connection, we are mindful that a reviewing court should "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." S.Rep. 93-1200, 93d Cong., 2d Sess. 12 (1974), U.S.Code Cong. & Admin.News 1974, p. 6290.

4. Specifically, Documents 11 (p. 6), 13 (p. 2) and 31 (administrative pages 1-4).

released after the identifying data has been deleted. Accordingly, these pages are appropriately subject to an *in camera* review by the district court.

We note also that on numerous occasions the agency has relied on § 552(b)(7)(D) in withholding the so-called "symbol numbers" of confidential sources. It is not clear to us, however, precisely why these "symbol numbers" represent identifying data. On remand, therefore, the agency should be given an opportunity to explain the ways in which the "symbol numbers" could reveal the identity of a confidential informant.

Accordingly, the case is remanded for the limited purposes set forth above. In all other respects the opinion of the district court is affirmed.

Cardova LAWARY, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

No. 78-2394.

United States Court of Appeals, Seventh Circuit.

Argued May 1, 1979.

Decided May 25, 1979.

Appeal was taken from an order of the United States District Court for the Eastern District of Illinois, James L. Foreman, J., denying defendant's motion to vacate sentence. The Court of Appeals held that: (1) holding in *Dorszynski v. U. S.* requiring that explicit finding that defendant would not benefit from sentencing under Youth Corrections Act does not apply retroactively, and (2) defendant's state bank robbery conviction and its resultant sentence established substantial basis in record to support district court's disclaimer that it did not consider in sentencing defendant's three prior juvenile convictions obtained without appointment of counsel.

Affirmed.

1. Criminal Law ⇐1044.2(1)

Where district court in ruling on defendant's motion to vacate sentence raised sua sponte the issue of its failure to make explicit finding that defendant would not benefit from sentencing under Youth Corrections Act, issue was properly raised for appeal even though defendant did not raise such issue in making motion. 18 U.S.C.A. § 5010; 28 U.S.C.A. § 2255.

2. Criminal Law ⇐997.18

Decision to consider successive motion to vacate sentence, raising grounds raised before, is in district court's discretion. 28 U.S.C.A. § 2255.

3. Criminal Law ⇐1023(15)

Where defendant's second motion to vacate sentence was not dismissed on grounds that it raised issues identical to those raised before and issues raised before were, on court's own motion raised again, and then dismissed for reasons given before, such act amounted to reconsideration of merits and appeal therefrom was properly before reviewing court. 28 U.S.C.A. § 2255.

4. Courts ⇐100(1)
Criminal Law ⇐1181

Holding of *Dorszynski v. U. S.* requiring explicit finding that defendant would not benefit from sentencing under Youth Corrections Act does not apply retroactively; however, possibility of remand where sentencing judge in fact omitted consideration of Youth Corrections Act sentencing is not limited. 18 U.S.C.A. § 5010.

5. Criminal Law ⇐1158(1)

Where judge ruling on defendant's motion to vacate sentence, made on ground that prior convictions obtained without assistance of counsel were improperly relied upon in sentencing, was also sentencing